

From: Johnny Amaral

Sent: Monday, January 4, 2016 9:38 AM

To: David Bernhardt; Dennis Cardoza; Denny Rehberg; Catherine Karen; Ryan A. ' 'Smith

Subject: Today

I'm traveling today, on my way to Sacramento for meetings. Do any of you have any reason for us to jump on the call this morning? If not we can cancel this weeks call. Please let me know

Best,

Johnny Amaral

From: Denny Rehberg
Sent: Monday, January 4, 2016 9:58 AM
To: Johnny Amaral
CC: David Bernhardt; Dennis Cardoza; Catherine Karen; Ryan A. ' 'Smith
Subject: Re: Today

I'm traveling as well. No need on my end.

.....
Mercury.

Denny Rehberg
Co-Chairman
(US Congressman 2001-2013)
The Portrait Building
701 8th Street NW | Suite 650
Washington, DC | 20001
202.261.4000 office | [REDACTED] mobile
www.mercuryllc.com

> On Jan 4, 2016, at 9:38 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

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>

> Best,

>

> Johnny Amaral

>

>

From: Bernhardt, David L.

Sent: Monday, January 4, 2016 10:00 AM

To: 'Johnny Amaral'; Dennis Cardoza; Denny Rehberg; Catherine Karen; Smith, Ryan A.

Subject: RE: Today

We can cancel.

-----Original Message-----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]

Sent: Monday, January 04, 2016 11:38 AM

To: Bernhardt, David L.; Dennis Cardoza; Denny Rehberg; Catherine Karen; Smith, Ryan A.

Subject: Today

I'm traveling today, on my way to Sacramento for meetings. Do any of you have any reason for us to jump on the call this morning? If not we can cancel this weeks call. Please let me know

Best,

Johnny Amaral

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From: DCardoza@foley.com
Sent: Monday, January 4, 2016 10:33 AM
To: Bernhardt, David L.
CC: Johnny Amaral; Denny Rehberg; Catherine Karen; Smith, Ryan A.
Subject: Re: Today

Good either way. Dennis

Sent from my iPhone

> On Jan 4, 2016, at 11:59 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:
>
> We can cancel.
>
> -----Original Message-----
> From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
> Sent: Monday, January 04, 2016 11:38 AM
> To: Bernhardt, David L.; Dennis Cardoza; Denny Rehberg; Catherine Karen; Smith, Ryan A.
> Subject: Today
>
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From: Sarah Woolf

Sent: Wednesday, January 6, 2016 4:15 PM

To: David Longly Bernhardt; Johnny Amaral

Subject: Fwd: Questions for the Record from the 10/8/15 ENR Cmte Hearing regarding Drought Legislation

I completely did not get this done. AND, I am traveling until the 14th. Is there any way either of you could help me with this? Clearly I never got my responses together. Let me know if I need to draft something first or if you can take a stab at it.

Thank you,

Sarah Woolf

Water Wise

██████████@██████████.██████████

559-██████████-██████████

Begin forwarded message:

From: "Ripchensky, Darla (Energy)" <Darla_Ripchensky@energy.senate.gov>

Subject: RE: Questions for the Record from the 10/8/15 ENR Cmte Hearing regarding Drought Legislation

Date: January 5, 2016 at 5:01:46 PM EST

To: "██████████@██████████.██████████" <██████████@██████████.██████████>

Good afternoon, Ms. Woolf. Can you please provide me with status of your responses to the Questions for the Record which were submitted to you for the October 8th Drought hearing? Upon receipt of your responses, we will be able to finalize this hearing and send it to printing.

Many thanks!

Darla Ripchensky

From: Ripchensky, Darla (Energy)

Sent: Wednesday, October 14, 2015 5:33 PM

To: ██████████@██████████.██████████

Cc: Kearney, Christopher (Energy); Stansbury, Melanie (Energy); Donnelly, Kellie (Energy); Huffnagle, Jason (Energy); Bonner, Rebecca (Energy)

Subject: Questions for the Record from the 10/8/15 ENR Cmte Hearing regarding Drought Legislation

Good afternoon, Ms. Woolf. Attached are Questions for the Record which have been submitted to you by Chairman Murkowski and Senator Hirono from last Thursday's hearing regarding drought legislation. We respectfully request that you provide your responses to these questions by **Friday, November 6, 2015** for inclusion in the official hearing record.

Please provide the responses directly to me, and feel free to contact me if you have any questions. Thank you for your assistance with this request.

Sincerely,

Darla Ripchensky, PMP
Chief Clerk
U.S. Senate Committee on Energy and Natural Resources
304 Dirksen Senate Office Building
Washington, DC 20510
202.224.3607

From: Bernhardt, David L.

Sent: Thursday, January 7, 2016 8:13 AM

To: Sarah Woolf

CC: Johnny Amaral

Subject: Re: Questions for the Record from the 10/8/15 ENR Cmte Hearing regarding Drought Legislation

I can draft responses for your final review by Monday. This is not a problem, and I'm happy to reach out to the committee.

Sent from my iPhone

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From: Johnny Amaral

Sent: Thursday, January 7, 2016 8:14 AM

To: Sarah Woolf

CC: David Longly Bernhardt

Subject: Re: Questions for the Record from the 10/8/15 ENR Cmte Hearing regarding Drought Legislation

Oh crap. Yes of course. I will coordinate with David today and get it done

Best,

Johnny Amaral

On Jan 7, 2016, at 7:10 AM, Sarah Woolf <[REDACTED]@[REDACTED].[REDACTED]> wrote:

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Subject: Re: Questions for the Record from the 10/8/15 ENR Cmte Hearing regarding Drought Legislation

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Sent: Thursday, January 7, 2016 9:20 AM

To: Bernhardt, David L.

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Ok. Let me know if you want or need anything from me

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559-██████████ ██████████

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<[Darla_Ripchensky@
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Date: January 5, 2016
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From: Johnny Amaral

Sent: Thursday, January 7, 2016 9:39 AM

To: 'Bernhardt, David L.'

Subject: RE: Questions for the Record from the 10/8/15 ENR Cmte Hearing regarding Drought Legislation

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Darla Ripchensky

From: Ripchensky, Darla (Energy)
Sent: Wednesday, October 14, 2015
5:33 PM
To: [REDACTED]@[REDACTED]; [REDACTED]
Cc: Kearney, Christopher (Energy);
Stansbury, Melanie (Energy); Donnelly,
Kellie (Energy); Huffnagle, Jason
(Energy); Bonner, Rebecca (Energy)
Subject: Questions for the Record from
the 10/8/15 ENR Cmte Hearing
regarding Drought Legislation

Good afternoon, Ms.
Woolf. Attached are Questions for
the Record which have been
submitted to you by Chairman
Murkowski and Senator Hirono from
last Thursday's hearing regarding
drought legislation. We respectfully
request that you provide your
responses to these questions
by **Friday, November 6, 2015** for
inclusion in the official hearing
record.

Please provide the responses directly
to me, and feel free to contact me if
you have any questions. Thank you
for your assistance with this request.
Sincerely,

Darla Ripchensky, PMP
Chief Clerk
U.S. Senate Committee on Energy
and Natural Resources
304 Dirksen Senate Office Building
Washington, DC 20510
202.224.3607

STATEMENT OF CONFIDENTIALITY &
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confidential, intended only for the use of the
individual or entity named above. If the reader of
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the message. Thank you.

From: Rojewski, Cole

Sent: Friday, January 8, 2016 9:14 AM

To: jamaral@westlandswater.org; Bernhardt, David L. (DBernhardt@BHFS.com)

CC: Dunklin, Kristina

Subject: Todays Call

Attachments: 12 17 15 Drainage Leg Amendment.doc.docx; Friant Request - SWP Offset and Water Rights Protections (11-24-15).docx

Items I'd like to discuss and understand better on the 9am pst/ 12pm est call.

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Cole Rojewski

Chief of Staff

Rep. David G. Valadao (CA-21)

Proposed language to be included in Westlands Drainage Settlement Legislation:

Implementation of this Act and the Agreements authorized thereunder shall not:

- (a) Result in the involuntary reduction in the contract water allocation to any Central Valley Project long-term water service, repayment, settlement, exchange, or refuge contractor, including contractors in the Friant Division of the Central Valley Project;*
- (b) Modify, amend or affect any of the rights and obligations of the parties to any Central Valley Project long-term water service, repayment, settlement, exchange, or refuge contract, including contracts in the Friant Division of the Central Valley Project; or*
- (c) Alter the repayment obligation of any long-term water service, repayment, or settlement contractor receiving water or power from the Central Valley Project, or shift any costs to other such contractors that would otherwise have been properly assignable to San Luis Unit Contractors under this Act, including operations and maintenance costs, construction costs, or other capitalized costs allocated to San Luis Unit Contractors after the date of this Act.*
- (d) Impair the ability of the United States to implement Paragraph 16 (The Water Management Goal) of the Stipulation of Settlement entered by the parties to Natural Resources Defense Council, et al. v. Rogers, et al, (Case NO CIV S-88-1658 (LKK/GGH) E.D.Cal.) dated September 13, 2006, as authorized to be implemented by Title X of Public Law 111-11.*
- (e) Diminish, impair, or otherwise affect in any manner any priorities for the allocation, delivery or use of water under applicable law, including any purposes of use and priorities established by Sections 3402 and 3406 of the Central Valley Project Improvement Act (Public Law 102-575; 106 Stat. 4706).*

Sec. 06. State water project offset and water rights protections.

(a) Offset for State Water Project

1. **IMPLEMENTATION IMPACTS.**—The Secretary of the Interior shall confer with the California Department of Fish and Wildlife in connection with the implementation of this Act on potential impacts to any consistency determination for operations of the State Water Project issued pursuant to California Fish and Game Code section 2080.1.
2. **ADDITIONAL YIELD.**—If, as a result of the application of this Act, the California Department of Fish and 3 Wildlife—
 - i. determines that operations of the State Water Project are inconsistent with the consistency determinations issued pursuant to California Fish and Game Code section 2080.1 for operations of the State Water Project; or
 - ii. requires take authorization under California Fish and Game Code section 2081 for operation of the State Water Project in a manner that directly or indirectly results in reduced water supply to the State Water Project as compared with the water supply available under the smelt biological opinion and the salmonid biological opinion; and

as a result, Central Valley Project yield is greater than it otherwise would have been, then that additional yield shall be made available to the State Water Project for delivery to State Water Project contractors to offset that reduced water supply.

3. **NOTIFICATION RELATED TO ENVIRONMENTAL PROTECTIONS.**—The Secretary of the Interior and Secretary of Commerce shall—
 - i. notify the Director of the California Department of Fish and Wildlife regarding any changes in the manner in which the smelt biological opinion or the salmonid biological opinion is implemented; and
 - ii. confirm that those changes are consistent with the Endangered Species Act.

(b) Area of Origin and Water Rights Protections

1. **IN GENERAL.**—The Secretary of the Interior and the Secretary of Commerce, in carrying out the mandates of this Act, shall take no action that—
 - i. diminishes, impairs, or otherwise affects in any manner any area of origin, watershed of origin, county of origin, or any other water rights protection,

including rights to water appropriated prior to December 19, 1914, provided under State law;

- ii. limits, expands or otherwise affects the application of section 10505, 10505.5, 11128, 11460, 11461, 11462, 11463, or 12200 through 12220 of the California Water Code or any other provision of State water rights law, without respect to whether such a provision is specifically referred to in this Act; or
 - iii. diminishes, impairs, or otherwise affects in any manner any water rights or water rights priorities under applicable law. .
2. Section 7 of the Endangered Species Act- Any action proposed to be undertaken by the Secretaries pursuant to both this Act and Section 7 of the Endangered Species Act of 1973 (16 U.S. C. 1531 et seq.) shall be undertaken in a manner that does not alter water rights or water rights priorities established by California law or it shall not be undertaken at all. Nothing in this section affects the Secretaries' obligations under Section 7 of the Endangered Species Act.
3. EFFECT OF ACT.—
- i. Nothing in this Act affects or modifies any obligation of the Secretary of the Interior under section 8 of the Act of June 17, 1902 (32 Stat. 390, chapter 1093).
 - ii. Nothing in this Act diminishes, impairs, or otherwise affects in any manner any Project purposes or priorities for the allocation, delivery or use of water under applicable law, including the Project purposes and priorities established under Section 3402 and Section 3406 of the Central Valley Project Improvement Act (Public Law 102-575; 106 Stat. 4706).

(c) No Redirected Adverse Impacts

- 1. IN GENERAL.—The Secretary of the Interior and Secretary of Commerce shall not carry out any specific action authorized under this Act that will directly or through State agency action indirectly result in the involuntary reduction of water supply to an individual, district, or agency that has in effect a contract for water with the State Water Project or the Central Valley Project, including Settlement and Exchange contracts, refuge contracts, and Friant Division contracts, as compared to the water supply that would be provided in the absence of action under this Act, and nothing in this Act is intended to modify, amend or affect any of the rights and obligations of the parties to such contracts.
- 2. ACTION ON DETERMINATION.— If, after exploring all options, the Secretary of the Interior or the Secretary of Commerce makes a final determination that a

proposed action under this Act cannot be carried out in accordance with subsection (1), that Secretary:

- i. shall document that determination in writing for that action, including a statement of the facts relied on, and an explanation of the basis, for the decision;
- ii. may exercise the Secretary's existing authority, including authority to undertake the drought-related actions otherwise addressed in this title, or to otherwise comply with other applicable law, including the Endangered Species Act (16 U.S.C. 1531 et seq.), and
- iii. shall comply with subsection (a).

(d) Allocations for Sacramento Valley Water Service Contractors

1. Definitions.—In this section:

- i. EXISTING CENTRAL VALLEY PROJECT AGRICULTURAL WATER SERVICE CONTRACTOR WITHIN THE SACRAMENTO RIVER WATERSHED.—The term “existing Central Valley Project agricultural water service contractor within the Sacramento River Watershed” means any water service contractor within the Shasta, Trinity, or Sacramento River division of the Central Valley Project that has in effect a water service contract on the date of enactment of this Act that provides water for irrigation.
- ii. YEAR TERMS.—The terms “Above Normal”, “Below Normal”, “Dry”, and “Wet”, with respect to a year, have the meanings given those terms in the Sacramento Valley Water Year Type (40–30–30) Index.

2. Allocations of Water.—

- i. ALLOCATIONS.—Subject to subsection (c), the Secretary of the Interior shall make every reasonable effort in the operation of the Central Valley Project to allocate water provided for irrigation purposes to each existing Central Valley Project agricultural water service contractor within the Sacramento River Watershed in accordance with the following:
 - 1. Not less than 100 percent of the contract quantity of the existing Central Valley Project agricultural water service contractor within the Sacramento River Watershed in a “Wet” year.
 - 2. Not less than 100 percent of the contract quantity of the existing Central Valley Project agricultural water service contractor within the Sacramento River Watershed in an “Above Normal” year.

3. Not less than 100 percent of the contract quantity of the existing Central Valley Project agricultural water service contractor within the Sacramento River Watershed in a “Below Normal” year that is preceded by an “Above Normal” or “Wet” year.
 4. Not less than 50 percent of the contract quantity of the existing Central Valley Project agricultural water service contractor within the Sacramento River Watershed in a “Dry” year that is preceded by a “Below Normal”, “Above Normal”, or “Wet” year.
 5. Subject to paragraph (ii), in any other year not identified in any of subparagraphs (1) through (4), not less than twice the allocation percentage to south-of-Delta Central Valley Project agricultural water service contractors, up to 100 percent.
- ii. EFFECT OF SUBPARAGRAPH.—Nothing in paragraph (i)(5) precludes an allocation to an existing Central Valley Project agricultural water service contractor within the Sacramento River Watershed that is greater than twice the allocation percentage to a south-of-Delta Central Valley Project agricultural water service contractor.
3. Protection of Environment, Municipal and Industrial Supplies, and Other Contractors.—
- i. ENVIRONMENT.—Nothing in subsection (2) shall adversely affect—
1. the cold water pool behind Shasta Dam;
 2. the obligation of the Secretary of the Interior to make water available to managed wetlands pursuant to section 3406(d) of the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4722); or
 3. any obligation—
 - a. of the Secretaries under the smelt biological opinion, the salmonid biological opinion, or any other applicable biological opinion; or
 - b. under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or any other applicable law (including regulations).
- ii. MUNICIPAL AND INDUSTRIAL SUPPLIES.—Nothing in subsection (2)—
1. modifies any provision of a water service contract that addresses municipal or industrial water shortage policies of the Secretaries;

2. affects or limits the authority of the Secretaries to adopt or modify municipal and industrial water shortage policies;
3. affects or limits the authority of the Secretaries to implement a municipal or industrial water shortage policy;
4. constrains, governs, or affects, directly or indirectly, the operations of the American River division of the Central Valley Project or any deliveries from that division or a unit or facility of that division; or
5. affects any allocation to a Central Valley Project municipal or industrial water service contractor by increasing or decreasing allocations to the contractor, as compared to the allocation the contractor would have received absent subsection (2).

iii. OTHER CONTRACTORS.—Nothing in subsection (b)—

1. affects the priority of any individual or entity with Sacramento River water rights, including an individual or entity with a Sacramento River settlement contract, that has priority to the diversion and use of Sacramento River water over water rights held by the United States for operations of the Central Valley Project;
2. affects the obligation of the United States to make a substitute supply of water available to the San Joaquin River exchange contractors;
3. affects the allocation of water to Friant division contractors of the Central Valley Project;
4. results in the involuntary reduction in contract water allocations to individuals or entities with contracts to receive water from the Friant division; or
5. authorizes any actions inconsistent with State water rights law.

From: Bernhardt, David L.
Sent: Friday, January 8, 2016 9:19 AM
To: 'Rojewski, Cole'; jamaral@westlandswater.org
CC: Dunklin, Kristina
Subject: RE: Todays Call

Cole: Let's use the following call in number [REDACTED] code [REDACTED]

From: Rojewski, Cole [mailto:Cole.Rojewski@mail.house.gov]
Sent: Friday, January 08, 2016 11:14 AM
To: jamaral@westlandswater.org; Bernhardt, David L.
Cc: Dunklin, Kristina
Subject: Todays Call

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Cole Rojewski
Chief of Staff
Rep. David G. Valadao (CA-21)

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From: Rojewski, Cole
Sent: Friday, January 8, 2016 10:39 AM
To: 'Bernhardt, David L.'; jamaral@westlandswater.org
CC: Dunklin, Kristina
Subject: RE: Todays Call

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From: Bernhardt, David L.
Sent: Friday, January 8, 2016 10:44 AM
To: 'Rojewski, Cole'; jamaral@westlandswater.org
CC: Dunklin, Kristina
Subject: RE: Todays Call

That's great.

From: Rojewski, Cole [mailto:Cole.Rojewski@mail.house.gov]
Sent: Friday, January 08, 2016 12:39 PM
To: Bernhardt, David L.; jamaral@westlandswater.org
Cc: Dunklin, Kristina
Subject: RE: Todays Call

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Sent: Friday, January 8, 2016 12:13 PM

To: jamaral@westlandswater.org; tbirmingham@westlandswater.org; Bernhardt, David L. (DBernhardt@BHFS.com); Smith, Ryan A. (RSmith@BHFS.com)

CC: Dunklin, Kristina

Subject: Most Updated Verision of Settlement Bill

Attachments: VALADA_013_xml.pdf

Attached

Cole Rojewski

Chief of Staff

Rep. David G. Valadao (CA-21)

.....
(Original Signature of Member)

114TH CONGRESS
2D SESSION

H. R.

To affirm an agreement between the United States and Westlands Water
District dated September 15, 2015, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. VALADAO introduced the following bill; which was referred to the
Committee on

A BILL

To affirm an agreement between the United States and
Westlands Water District dated September 15, 2015,
and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.— This Act may be cited as the
5 “San Luis Unit Drainage Resolution Act”.

6 (b) TABLE OF CONTENTS.—The table of contents for
7 this Act is:

Sec. 1. Short title; table of contents.
Sec. 2. Definitions.

- Sec. 3. Approval of agreements.
- Sec. 4. Relief from drainage obligation.
- Sec. 5. Drainage implementation.
- Sec. 6. Water delivery contracts.
- Sec. 7. Repayment obligations.
- Sec. 8. Transfer of title to certain facilities.
- Sec. 9. Compliance with applicable law.
- Sec. 10. No water supply or financial impacts on other Central Valley Project contractors.
- Sec. 11. Restoration fund payments by Westlands Water District.

1 **SEC. 2. DEFINITIONS.**

2 In this Act:

3 (1) NORTHERLY DISTRICTS AGREEMENT.—The
4 term “Northerly Districts Agreement” means the
5 Agreement among the United States, San Luis
6 Water District, Panoche Water District, and
7 Pacheco Water District.

8 (2) PROJECT.—The term “Project” means the
9 Central Valley Project, owned by the United States
10 and managed by the Department of the Interior,
11 Bureau of Reclamation.

12 (3) PROJECT WATER.—The term “Project
13 Water” means all water that is developed, diverted,
14 stored, or delivered by the Secretary in accordance
15 with the statutes authorizing the Project and in ac-
16 cordance with the terms and conditions of water
17 rights acquired pursuant to California law.

18 (4) REPAYMENT CONTRACT.—The term “repay-
19 ment contract” means the repayment contract con-
20 verted under section 6(a).

1 (5) SAN LUIS ACT.—The term “San Luis Act”
2 means the Act of June 3, 1960 (Public Law 86–
3 488), and all Acts amendatory thereof and supple-
4 mentary thereto.

5 (6) SAN LUIS UNIT.—The term “San Luis
6 Unit” means those lands identified in section 1 of
7 the San Luis Act.

8 (7) SAN LUIS UNIT CONTRACTORS.—The term
9 “San Luis Unit Contractors” means Westlands
10 Water District (including Broadview Water District
11 lands annexed within Westlands Water District),
12 San Luis Water District, Panoche Water District,
13 and Pacheco Water District.

14 (8) SECRETARY.—The term “Secretary” means
15 the Secretary of the Interior.

16 (9) WESTLANDS AGREEMENT.—The term
17 “Westlands Agreement” means the “Agreement be-
18 tween the United States and Westlands Water Dis-
19 trict” to settle litigation concerning the United
20 States’ duty to provide drainage service, entered
21 September 15, 2015.

22 **SEC. 3. APPROVAL OF AGREEMENTS.**

23 Notwithstanding any other provision of law, unless
24 otherwise specified herein, the Secretary is hereby directed

1 to implement the terms and conditions of the Westlands
2 Agreement and the Northerly Districts Agreement.

3 **SEC. 4. RELIEF FROM DRAINAGE OBLIGATION.**

4 The San Luis Act is amended as follows:

5 (1) In the first section—

6 (A) in the second sentence, by striking
7 “distribution systems, drains,”; and

8 (B) in the sixth sentence—

9 (i) by striking “the Secretary has (1)”
10 and inserting “the Secretary has”; and

11 (ii) by striking “, and (2) received”
12 and all that follows through “December,
13 17, 1956”.

14 (2) In section 5, by striking the first sentence
15 and inserting “Notwithstanding any other provision
16 of law, the Secretary of the Interior shall have no
17 duty to provide drainage or drainage service to the
18 San Luis Unit. Each contractor within the San Luis
19 Unit that receives water for the purpose of irrigation
20 shall be responsible for the management of drainage
21 water within its boundaries, in accordance with Fed-
22 eral and California law consistent with the
23 Westlands Agreement and Northerly District Agree-
24 ment respectively.”.

25 (3) In section 8—

- 1 (A) in the first sentence, by striking “other
2 than distribution systems and drains,”; and
3 (B) in the third sentence—
4 (i) by striking “(a) for construction”
5 and all that follows through “ and (b)”;
6 and
7 (ii) by striking “: *Provided*” and all
8 that follows through “such works are
9 placed in service”.

10 **SEC. 5. DRAINAGE IMPLEMENTATION.**

11 The Westlands Water District shall assume all legal
12 responsibility for the management of drainage water with-
13 in its boundaries in accordance with Federal and Cali-
14 fornia law, and in accordance with the Westlands Agree-
15 ment and Westlands Water District shall not discharge
16 drain water outside of its boundaries.

17 **SEC. 6. WATER DELIVERY CONTRACTS.**

18 (a) CONTRACT CONVERSION.—The Secretary shall
19 convert the Westlands Water District existing long-term
20 or interim renewal water service contract entered into
21 under section 9(e) of the Act of August 4, 1939 (53 Stat.
22 1196), to a repayment contract under section 9(d) and
23 9(c)(1) of the Act of August 4, 1939 (53 Stat. 1195,
24 1194) consistent with the Westlands Agreement.

25 (b) ALLOCATION DECISIONS.—

1 (1) IN GENERAL.—Notwithstanding subsection
2 (a) and as provided in the Westlands Agreement, the
3 Secretary shall make allocation decisions in the
4 Project consistent with the requirements of Federal
5 law (including the Endangered Species Act of 1973
6 and Reclamation law) and applicable California
7 State Water Resources Control Board requirements.

8 (2) CONVERSION OF CONTRACT.—Conversion of
9 Westlands Water District’s contract pursuant to
10 subsection (a) shall not afford Westlands Water Dis-
11 trict greater or lesser rights to an annual allocation
12 of Project Water than Westlands Water District had
13 before that conversion.

14 (3) LIMITATION ON LIABILITY.—No liability
15 shall accrue against the United States or any of its
16 officers, agents, or employees for any damage, direct
17 or indirect, arising from a condition of shortage in
18 the amount of water available for delivery to the San
19 Luis Unit Contractors caused by—

20 (A) errors in physical operations of the
21 Project;

22 (B) physical causes beyond the control of
23 the Contracting Officer, including drought; or

24 (C) actions taken by the Contracting Offi-
25 cer to meet legal obligations.

1 (c) WATER SERVICE CONTRACT FOR LEMOORE
2 NAVAL AIR STATION.—

3 (1) CONTRACT REQUIRED.—The Secretary shall
4 enter into a contract under section 9(e) of the Act
5 of August 4, 1939 (53 Stat. 1196), with the Sec-
6 retary of the Navy for the delivery of Project Water
7 to the Lemoore Naval Air Station to meet the irriga-
8 tion needs of Lemoore Naval Air Station associated
9 with air operations. The contract amount of Project
10 Water made available to the Lemoore Naval Air Sta-
11 tion under such contract shall be determined by the
12 Secretary through technical analysis with the
13 Lemoore Naval Air Station.

14 (2) CONDITION OF SHORTAGE.—In any year in
15 which there may occur a condition of shortage in the
16 amount of water available for delivery, the Con-
17 tracting Officer shall allocate the available Project
18 Water amount to Lemoore Naval Air Station in ac-
19 cordance with the allocation steps for municipal and
20 industrial water service contractors under the Cen-
21 tral Valley Project Municipal and Industrial Water
22 Shortage Policy (as in effect on the effective date of
23 the repayment contract). For purposes of deter-
24 mining “historical use” under the policy, past water
25 use for irrigation needs by the Lemoore Naval Air

1 Station under the contract authorized by this section
2 or such use previous to the contract may be consid-
3 ered.

4 **SEC. 7. REPAYMENT OBLIGATIONS.**

5 (a) SUSPENSION OF CAPITAL OBLIGATION.—
6 Westlands Water District's capital repayment obligation
7 and payments under its water service contracts and the
8 April 1, 1965, repayment contract between the United
9 States and Westlands Water District (contract numbered
10 14-06-200-2020-A) as further defined in subsection (b),
11 is suspended until the execution of the repayment con-
12 tract. Upon execution of that repayment contract,
13 Westlands Water District shall receive a credit against fu-
14 ture operation and maintenance costs payable to the
15 United States in the amount of the capital costs under
16 the water service contracts and the 1965 Repayment Con-
17 tract paid by Westlands Water District between the date
18 of the Westlands Agreement and the date of the enact-
19 ment of this Act. Costs incurred by the United States for
20 revaluating, planning, or providing drainage service to
21 Westlands Water District shall be non-reimbursable, as
22 set forth in paragraph (9)(C)(iv) of the Westlands Agree-
23 ment.

24 (b) RELIEF OF CAPITAL REPAYMENT OBLIGA-
25 TIONS.—Upon the date of execution of the repayment con-

1 tract, and as set forth in the Westlands Agreement, the
2 following shall take effect:

3 (1) IN GENERAL.—Westlands Water District
4 shall be relieved of—

5 (A) its capital repayment obligations under
6 the June 5, 1963, water service contract be-
7 tween the United States and Westlands Water
8 District (contract number 14–06–200–495–A)
9 providing for water service, or any renewals
10 thereof, and any water service contracts as-
11 signed to Westlands Water District, Westlands
12 Distribution District No. 1, and Westlands Dis-
13 tribution District No. 2 existing as of the date
14 of the execution of the Westlands Agreement;
15 and

16 (B) any remaining repayment obligation
17 under the April 1, 1965, repayment contract
18 between the United States and Westlands
19 Water District (contract numbered 14–06–200–
20 2020–A).

21 (2) LIMITATION ON RELIEF.—Repayment relief
22 granted in paragraph (1) shall not extend to—

23 (A) Westlands Water District’s operation
24 and maintenance obligations, whether payable

1 to the United States or to an Operating Non-
2 Federal Entity;

3 (B) construction costs or other capitalized
4 costs not yet allocated to or incurred by
5 Westlands Water District as of the date of the
6 Westlands Agreement, including costs attrib-
7 utable to the Folsom Safety of Dams modifica-
8 tions, the B.F. Sisk corrective action study, or
9 any Safety of Dams; or

10 (C) the repayment of future capital costs
11 incurred after the date of execution of the
12 Westlands Agreement.

13 (c) REPAYMENT OF COSTS.—Central Valley Project
14 construction costs or other capitalized costs allocated to
15 Westlands Water District after the date of the Westlands
16 Agreement, and properly assignable to Westlands Water
17 District, shall be repaid in not more than 5 years after
18 notification of the allocation of such amount of less than
19 \$5,000,000. If such amount is \$5,000,000 or greater, such
20 cost shall be repaid as provided by applicable Reclamation
21 law. Any additional costs that may have been assigned to
22 Westlands Water District pursuant to paragraph
23 (9)(C)(iv) of the Westlands Agreement related to the Cen-
24 tral Valley Project final cost allocation shall be non-reim-
25 bursable.

1 (d) APPLICABILITY OF CERTAIN PROVISIONS.—

2 (1) RECLAMATION REFORM ACT.—Upon dis-
3 charge of the capital repayment obligation as pro-
4 vided in subsection (b), the provisions of section
5 213(a) and (b) of the Reclamation Reform Act of
6 1982 (96 Stat. 1269) shall be deemed to apply to
7 lands in Westlands Water District, and the owner-
8 ship and full cost pricing limitations in any provision
9 of Federal reclamation law shall not apply to lands
10 in the District notwithstanding the subsequent allo-
11 cation of construction costs or other capitalized costs
12 to the District. These exemptions shall be carried
13 out in accordance with the process set forth in the
14 Westlands Agreement.

15 (2) OTHER PROVISIONS.—Nothing in this Act is
16 intended to relieve the San Luis Unit Contractors of
17 any other obligations under Reclamation Law in-
18 cluding Restoration Fund charges pursuant to sec-
19 tion 3407(d) of Public Law 102–575.

20 **SEC. 8. TRANSFER OF TITLE TO CERTAIN FACILITIES.**

21 (a) IN GENERAL.—Upon the execution of the repay-
22 ment contract, or as soon thereafter as practicable, the
23 Secretary shall transfer to Westlands Water District title
24 to the following:

1 (1) San Luis Canal System, excluding the main
2 canal that is integrated with the California Aque-
3 duct. These appurtenant features include—

4 (A) internal water distribution system
5 within Westlands, including approximately
6 1,045 miles of buried pipeline;

7 (B) pumping plants within Westlands, in-
8 cluding—

9 (i) San Luis Canal Left and Right
10 Bank pumping plants;

11 (ii) Pumping Plants P1 through P38
12 located at the head end of the gravity
13 laterals to supply the head required for the
14 “P” laterals;

15 (iii) Pumping Plants, tanks, res-
16 ervoirs, relift pumping plants to serve
17 lands west of the San Luis Canal; and

18 (iv) Pumping Plant 7.05 off Lateral
19 7; and

20 (C) related structures, appurtenances,
21 pumping plants, pumps, motors, meters, valves,
22 tanks, transformers, and electrical equipment
23 as specifically identified through the title trans-
24 fer process of federally owned facilities, equip-
25 ment, and real property.

1 (2) Mendota Pool diversion facilities operated
2 by Westlands Water District System, including the
3 following:

4 (A) Inlet Canal from the Fresno Slough.

5 (B) Pumping plants, 6-1, 6-2, 7-1, 7-2.

6 (C) Related structures, appurtenances,
7 pumps, motors, meters, valves, tanks, trans-
8 formers, and electrical equipment as specifically
9 identified through the title transfer process of
10 federally owned facilities, equipment, and real
11 property.

12 (3) Pleasant Valley System, including the fol-
13 lowing:

14 (A) Intake canal and pipeline.

15 (B) Pleasant Valley Pumping Plant.

16 (C) Coalinga Canal, including related
17 check structures, turnouts, and headworks.

18 (D) Pleasant Valley distribution system
19 and pumping plants along the Coalinga Canal.

20 (E) Related structures, appurtenances,
21 pumps, motors, meters, valves, tanks, trans-
22 formers, and electrical equipment as specifically
23 identified through the title transfer process of
24 federally owned facilities, equipment, and real
25 property.

1 (4) Drainage collection system, including the
2 following:

3 (A) Carrier and collector pipelines, sumps,
4 and sump pumps.

5 (B) San Luis Drain from Sta 6678+45 to
6 Sta 8520+22.87. (Crossing with DMC to La-
7 guna Ave crossing.)

8 (C) Related structures, appurtenances,
9 pumps, motors, meters, valves, tanks, trans-
10 formers, and electrical equipment as specifically
11 identified through the title transfer process of
12 federally owned facilities, equipment, and real
13 property.

14 (5) Tranquillity Field Office, including the fol-
15 lowing:

16 (A) Buildings at 32650 West Adams Ave-
17 nue, Tranquillity, CA 93668.

18 (B) All related fixtures and furnishings as
19 specifically identified through the title transfer
20 process of federally owned facilities, equipment,
21 and real property.

22 (6) Huron field office, including the following:

23 (A) Buildings at 32450 South Lassen Ave-
24 nue, Huron, CA 93234.

1 (B) All related fixtures and furnishings as
2 specifically identified through the title transfer
3 process of federally owned facilities, equipment,
4 and real property.

5 (7) All real property interests held by the
6 United States in lands underlying or otherwise asso-
7 ciated with the facilities and equipment listed in this
8 subsection (a), including all fee title, easements, and
9 rights of way.

10 (b) PAYMENT OF COSTS.—Except as specifically pro-
11 vided in this Act, any transfer of title to the Pleasant Val-
12 ley Pumping Plant, the Coalinga Canal, and any associ-
13 ated facilities shall not relieve any other Project Water
14 service or repayment contractor of the requirement to pay
15 any allocated costs associated with those conveyance or
16 pumping facilities that are properly allocated to those con-
17 tractors under existing law and Project ratesetting poli-
18 cies.

19 (c) LIABILITY ON TRANSFER OF TITLE.—Upon
20 transfer of title to any facilities pursuant to subsection
21 (a), Westlands Water District shall, as a condition to such
22 transfer, formally agree as of the date of transfer to—
23 (1) hold the United States harmless and indem-
24 nify the United States for any and all claims, cost,
25 damages, and judgments of any kind arising out of

1 any act, omission, or occurrence relating to the
2 transferred facilities, except for such claims, costs,
3 damages arising from acts of negligence committed
4 by the United States or by its employees, agents, or
5 contractors, prior to the date of title transfer, for
6 which the United States is found liable under the
7 Federal Tort Claims Act; and

8 (2) assume full responsibility for correcting and
9 financing any repairs or deficiencies that may exist
10 at the time of or following title transfer.

11 (d) COMPLIANCE.—The Secretary and Westlands
12 Water District shall comply with all applicable require-
13 ments under Federal and California law before title to a
14 facility is transferred pursuant to this section.

15 **SEC. 9. COMPLIANCE WITH APPLICABLE LAW.**

16 In implementing the measures authorized by this Act,
17 the Secretary shall comply with all applicable Federal
18 laws, rules, and regulations, including the National Envi-
19 ronmental Policy Act of 1969 (42 U.S.C. 4321 et seq.)
20 and the Endangered Species Act of 1973 (16 U.S.C. 1531
21 et seq.), as necessary.

1 **SEC. 10. NO WATER SUPPLY OR FINANCIAL IMPACTS ON**
2 **OTHER CENTRAL VALLEY PROJECT CON-**
3 **TRACTORS.**

4 Implementation of this Act and the Agreements au-
5 thorized thereunder shall not—

6 (1) result in the involuntary reduction in the
7 contract water allocation to any Central Valley
8 Project long-term water service, repayment, settle-
9 ment, exchange, or refuge contractor, including con-
10 tractors in the Friant Division of the Central Valley
11 Project;

12 (2) modify, amend or affect any of the rights
13 and obligations of the parties to any Central Valley
14 Project long-term water service, repayment, settle-
15 ment, exchange, or refuge contract, including con-
16 tracts in the Friant Division of the Central Valley
17 Project; or

18 (3) alter the repayment obligation of any long-
19 term water service, repayment, or settlement con-
20 tractor receiving water or power from the Central
21 Valley Project, or shift any costs to other such con-
22 tractors that would otherwise have been properly as-
23 signable to San Luis Unit Contractors under this
24 Act, including operations and maintenance costs,
25 construction costs, or other capitalized costs allo-

1 cated to San Luis Unit Contractors after the date
2 of this Act.

3 (4) Impair the ability of the United States to
4 implement Paragraph 16 (The Water Management
5 Goal) of the Stipulation of Settlement entered by the
6 parties to *Natural Resources Defense Council, et al.*
7 *v. Rogers, et al.*, (Case NO CIV S-88-1658 (LKK/
8 GGH) E.D.Cal.) dated September 13, 2006, as au-
9 thorized to be implemented by title X of Public Law
10 111-11.

11 (5) Diminish, impair, or otherwise affect in any
12 manner any priorities for the allocation, delivery, or
13 use of water under applicable law, including any
14 purposes of use and priorities established by sections
15 3402 and 3406 of the Central Valley Project Im-
16 provement Act (Public Law 102-575; 106 Stat.
17 4706).

18 **SEC. 11. RESTORATION FUND PAYMENTS BY WESTLANDS**
19 **WATER DISTRICT.**

20 For the purpose of avoiding a shift of Central Valley
21 Project Restoration Fund payments from Westlands
22 Water District to Central Valley Project preference power
23 contractors, for any year in which the allocation of water
24 for south-of-Delta Central Valley Project long-term water
25 service contractors or repayment contractors is greater

1 than 75 percent, the Secretary shall calculate for
2 Westlands Water District a per acre foot Restoration
3 Fund payment based on a projection that Westlands
4 Water District would take delivery of the allocation made
5 to south-of-Delta Central Valley Project long-term water
6 service contractors or repayment contractors.

From: Johnny Amaral

Sent: Friday, January 8, 2016 12:30 PM

To: 'Rojewski, Cole'; tbirmingham@westlandswater.org; 'Bernhardt, David L.'; 'Smith, Ryan A.'

CC: 'Dunklin, Kristina'

Subject: RE: Most Updated Verision of Settlement Bill

Thanks Cole.

I confirmed with Tom that 2pm PST works for our conference call.

Call 800-████-████ Pass code is █████

From: Rojewski, Cole [mailto:Cole.Rojewski@mail.house.gov]

Sent: Friday, January 8, 2016 11:13 AM

To: jamaral@westlandswater.org; tbirmingham@westlandswater.org; Bernhardt, David L. (DBernhardt@BHFS.com);
Smith, Ryan A. (RSmith@BHFS.com)

Cc: Dunklin, Kristina

Subject: Most Updated Version of Settlement Bill

Attached

Cole Rojewski

Chief of Staff

Rep. David G. Valadao (CA-21)

From: Bernhardt, David L.

Sent: Monday, January 11, 2016 6:01 AM

To: Johnny Amaral (jamaral@westlandswater.org); Thomas W. Birmingham (tbirmingham@westlandswater.org)

Subject: FYI From Politco Pro this am

Next move on drought legislation belongs to Feinstein: California Sen. Dianne Feinstein has to piece efforts back together over drought legislation quickly or risk watching other Western states move ahead without her. The window is closing for capturing this winter's rains, and senators from other parched states are champing at the bit to see their provisions move as part of a broader drought bill the Senate Energy and Natural Resources Committee worked on for half of last year. "There's been discussion amongst the Western delegation about what a West-wide drought bill would look like with or without California," a western Senate staffer tells ME. "Obviously the former is preferable, but the California delegation has been unable to get its act together thus far." Tom Nassif, president of the Western Growers Association, said moving legislation without California would be "a big mistake." Meanwhile, House Republicans are planning to sit back and see what Feinstein can do in the Senate, letting the measure they passed last year speak for itself, said Westlands Water District's Johnny Amaral, a former chief of staff to Rep. Devin Nunes.

Congress? We don't need no Congress: Nassif also said farmers are moving ahead on their own, investing in equipment and technology that can help them weather this drought and future ones - with or without Congress.

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From: Smith, Ryan A.

Sent: Monday, January 11, 2016 9:31 AM

To: 'Rojewski, Cole'; jamaral@westlandswater.org; tbirmingham@westlandswater.org; Bernhardt, David L.

CC: Dunklin, Kristina

Subject: RE: Most Updated Version of Settlement Bill

Attachments: VALADA_013_xml 1 11 16.pdf

Cole,

With one minor exception the bill draft looks good. Our proposed change is below:

SEC. 5. DRAINAGE IMPLEMENTATION.

The Westlands Water District shall assume all legal responsibility for the management of drainage water within its boundaries in accordance with Federal and California law, and in accordance with the Westlands Agreement; **provided that** ~~and~~ Westlands Water District shall not discharge
drain water outside of its boundaries.

Thanks again for all your hard work on the legislation.

Please let me know if you have any questions.

Thanks,

Ryan

From: Rojewski, Cole [mailto:Cole.Rojewski@mail.house.gov]

Sent: Friday, January 08, 2016 2:13 PM

To: jamaral@westlandswater.org; tbirmingham@westlandswater.org; Bernhardt, David L.; Smith, Ryan A.

Cc: Dunklin, Kristina

Subject: Most Updated Version of Settlement Bill

Attached

Cole Rojewski

Chief of Staff

Rep. David G. Valadao (CA-21)

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.....
(Original Signature of Member)

114TH CONGRESS
2D SESSION

H. R.

To affirm an agreement between the United States and Westlands Water
District dated September 15, 2015, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. VALADAO introduced the following bill; which was referred to the
Committee on

A BILL

To affirm an agreement between the United States and
Westlands Water District dated September 15, 2015,
and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.— This Act may be cited as the
5 “San Luis Unit Drainage Resolution Act”.

6 (b) TABLE OF CONTENTS.—The table of contents for
7 this Act is:

Sec. 1. Short title; table of contents.
Sec. 2. Definitions.

- Sec. 3. Approval of agreements.
- Sec. 4. Relief from drainage obligation.
- Sec. 5. Drainage implementation.
- Sec. 6. Water delivery contracts.
- Sec. 7. Repayment obligations.
- Sec. 8. Transfer of title to certain facilities.
- Sec. 9. Compliance with applicable law.
- Sec. 10. No water supply or financial impacts on other Central Valley Project contractors.
- Sec. 11. Restoration fund payments by Westlands Water District.

1 **SEC. 2. DEFINITIONS.**

2 In this Act:

3 (1) NORTHERLY DISTRICTS AGREEMENT.—The
4 term “Northerly Districts Agreement” means the
5 Agreement among the United States, San Luis
6 Water District, Panoche Water District, and
7 Pacheco Water District.

8 (2) PROJECT.—The term “Project” means the
9 Central Valley Project, owned by the United States
10 and managed by the Department of the Interior,
11 Bureau of Reclamation.

12 (3) PROJECT WATER.—The term “Project
13 Water” means all water that is developed, diverted,
14 stored, or delivered by the Secretary in accordance
15 with the statutes authorizing the Project and in ac-
16 cordance with the terms and conditions of water
17 rights acquired pursuant to California law.

18 (4) REPAYMENT CONTRACT.—The term “repay-
19 ment contract” means the repayment contract con-
20 verted under section 6(a).

1 (5) SAN LUIS ACT.—The term “San Luis Act”
2 means the Act of June 3, 1960 (Public Law 86–
3 488), and all Acts amendatory thereof and supple-
4 mentary thereto.

5 (6) SAN LUIS UNIT.—The term “San Luis
6 Unit” means those lands identified in section 1 of
7 the San Luis Act.

8 (7) SAN LUIS UNIT CONTRACTORS.—The term
9 “San Luis Unit Contractors” means Westlands
10 Water District (including Broadview Water District
11 lands annexed within Westlands Water District),
12 San Luis Water District, Panoche Water District,
13 and Pacheco Water District.

14 (8) SECRETARY.—The term “Secretary” means
15 the Secretary of the Interior.

16 (9) WESTLANDS AGREEMENT.—The term
17 “Westlands Agreement” means the “Agreement be-
18 tween the United States and Westlands Water Dis-
19 trict” to settle litigation concerning the United
20 States’ duty to provide drainage service, entered
21 September 15, 2015.

22 **SEC. 3. APPROVAL OF AGREEMENTS.**

23 Notwithstanding any other provision of law, unless
24 otherwise specified herein, the Secretary is hereby directed

1 to implement the terms and conditions of the Westlands
2 Agreement and the Northerly Districts Agreement.

3 **SEC. 4. RELIEF FROM DRAINAGE OBLIGATION.**

4 The San Luis Act is amended as follows:

5 (1) In the first section—

6 (A) in the second sentence, by striking
7 “distribution systems, drains,”; and

8 (B) in the sixth sentence—

9 (i) by striking “the Secretary has (1)”
10 and inserting “the Secretary has”; and

11 (ii) by striking “, and (2) received”
12 and all that follows through “December,
13 17, 1956”.

14 (2) In section 5, by striking the first sentence
15 and inserting “Notwithstanding any other provision
16 of law, the Secretary of the Interior shall have no
17 duty to provide drainage or drainage service to the
18 San Luis Unit. Each contractor within the San Luis
19 Unit that receives water for the purpose of irrigation
20 shall be responsible for the management of drainage
21 water within its boundaries, in accordance with Fed-
22 eral and California law consistent with the
23 Westlands Agreement and Northerly District Agree-
24 ment respectively.”.

25 (3) In section 8—

1 (A) in the first sentence, by striking “other
2 than distribution systems and drains,”; and
3 (B) in the third sentence—
4 (i) by striking “(a) for construction”
5 and all that follows through “ and (b)”;
6 and
7 (ii) by striking “: *Provided*” and all
8 that follows through “such works are
9 placed in service”.

10 **SEC. 5. DRAINAGE IMPLEMENTATION.**

11 The Westlands Water District shall assume all legal
12 responsibility for the management of drainage water with-
13 in its boundaries in accordance with Federal and Cali-
14 fornia law, and in accordance with the Westlands Agree-
15 ment and Westlands Water District shall not discharge
16 drain water outside of its boundaries.

17 **SEC. 6. WATER DELIVERY CONTRACTS.**

18 (a) CONTRACT CONVERSION.—The Secretary shall
19 convert the Westlands Water District existing long-term
20 or interim renewal water service contract entered into
21 under section 9(e) of the Act of August 4, 1939 (53 Stat.
22 1196), to a repayment contract under section 9(d) and
23 9(c)(1) of the Act of August 4, 1939 (53 Stat. 1195,
24 1194) consistent with the Westlands Agreement.

25 (b) ALLOCATION DECISIONS.—

1 (1) IN GENERAL.—Notwithstanding subsection
2 (a) and as provided in the Westlands Agreement, the
3 Secretary shall make allocation decisions in the
4 Project consistent with the requirements of Federal
5 law (including the Endangered Species Act of 1973
6 and Reclamation law) and applicable California
7 State Water Resources Control Board requirements.

8 (2) CONVERSION OF CONTRACT.—Conversion of
9 Westlands Water District’s contract pursuant to
10 subsection (a) shall not afford Westlands Water Dis-
11 trict greater or lesser rights to an annual allocation
12 of Project Water than Westlands Water District had
13 before that conversion.

14 (3) LIMITATION ON LIABILITY.—No liability
15 shall accrue against the United States or any of its
16 officers, agents, or employees for any damage, direct
17 or indirect, arising from a condition of shortage in
18 the amount of water available for delivery to the San
19 Luis Unit Contractors caused by—

20 (A) errors in physical operations of the
21 Project;

22 (B) physical causes beyond the control of
23 the Contracting Officer, including drought; or

24 (C) actions taken by the Contracting Offi-
25 cer to meet legal obligations.

1 (c) WATER SERVICE CONTRACT FOR LEMOORE
2 NAVAL AIR STATION.—

3 (1) CONTRACT REQUIRED.—The Secretary shall
4 enter into a contract under section 9(e) of the Act
5 of August 4, 1939 (53 Stat. 1196), with the Sec-
6 retary of the Navy for the delivery of Project Water
7 to the Lemoore Naval Air Station to meet the irriga-
8 tion needs of Lemoore Naval Air Station associated
9 with air operations. The contract amount of Project
10 Water made available to the Lemoore Naval Air Sta-
11 tion under such contract shall be determined by the
12 Secretary through technical analysis with the
13 Lemoore Naval Air Station.

14 (2) CONDITION OF SHORTAGE.—In any year in
15 which there may occur a condition of shortage in the
16 amount of water available for delivery, the Con-
17 tracting Officer shall allocate the available Project
18 Water amount to Lemoore Naval Air Station in ac-
19 cordance with the allocation steps for municipal and
20 industrial water service contractors under the Cen-
21 tral Valley Project Municipal and Industrial Water
22 Shortage Policy (as in effect on the effective date of
23 the repayment contract). For purposes of deter-
24 mining “historical use” under the policy, past water
25 use for irrigation needs by the Lemoore Naval Air

1 Station under the contract authorized by this section
2 or such use previous to the contract may be consid-
3 ered.

4 **SEC. 7. REPAYMENT OBLIGATIONS.**

5 (a) SUSPENSION OF CAPITAL OBLIGATION.—
6 Westlands Water District's capital repayment obligation
7 and payments under its water service contracts and the
8 April 1, 1965, repayment contract between the United
9 States and Westlands Water District (contract numbered
10 14-06-200-2020-A) as further defined in subsection (b),
11 is suspended until the execution of the repayment con-
12 tract. Upon execution of that repayment contract,
13 Westlands Water District shall receive a credit against fu-
14 ture operation and maintenance costs payable to the
15 United States in the amount of the capital costs under
16 the water service contracts and the 1965 Repayment Con-
17 tract paid by Westlands Water District between the date
18 of the Westlands Agreement and the date of the enact-
19 ment of this Act. Costs incurred by the United States for
20 revaluating, planning, or providing drainage service to
21 Westlands Water District shall be non-reimbursable, as
22 set forth in paragraph (9)(C)(iv) of the Westlands Agree-
23 ment.

24 (b) RELIEF OF CAPITAL REPAYMENT OBLIGA-
25 TIONS.—Upon the date of execution of the repayment con-

1 tract, and as set forth in the Westlands Agreement, the
2 following shall take effect:

3 (1) IN GENERAL.—Westlands Water District
4 shall be relieved of—

5 (A) its capital repayment obligations under
6 the June 5, 1963, water service contract be-
7 tween the United States and Westlands Water
8 District (contract number 14–06–200–495–A)
9 providing for water service, or any renewals
10 thereof, and any water service contracts as-
11 signed to Westlands Water District, Westlands
12 Distribution District No. 1, and Westlands Dis-
13 tribution District No. 2 existing as of the date
14 of the execution of the Westlands Agreement;
15 and

16 (B) any remaining repayment obligation
17 under the April 1, 1965, repayment contract
18 between the United States and Westlands
19 Water District (contract numbered 14–06–200–
20 2020–A).

21 (2) LIMITATION ON RELIEF.—Repayment relief
22 granted in paragraph (1) shall not extend to—

23 (A) Westlands Water District’s operation
24 and maintenance obligations, whether payable

1 to the United States or to an Operating Non-
2 Federal Entity;

3 (B) construction costs or other capitalized
4 costs not yet allocated to or incurred by
5 Westlands Water District as of the date of the
6 Westlands Agreement, including costs attrib-
7 utable to the Folsom Safety of Dams modifica-
8 tions, the B.F. Sisk corrective action study, or
9 any Safety of Dams; or

10 (C) the repayment of future capital costs
11 incurred after the date of execution of the
12 Westlands Agreement.

13 (c) REPAYMENT OF COSTS.—Central Valley Project
14 construction costs or other capitalized costs allocated to
15 Westlands Water District after the date of the Westlands
16 Agreement, and properly assignable to Westlands Water
17 District, shall be repaid in not more than 5 years after
18 notification of the allocation of such amount of less than
19 \$5,000,000. If such amount is \$5,000,000 or greater, such
20 cost shall be repaid as provided by applicable Reclamation
21 law. Any additional costs that may have been assigned to
22 Westlands Water District pursuant to paragraph
23 (9)(C)(iv) of the Westlands Agreement related to the Cen-
24 tral Valley Project final cost allocation shall be non-reim-
25 bursable.

1 (d) APPLICABILITY OF CERTAIN PROVISIONS.—

2 (1) RECLAMATION REFORM ACT.—Upon dis-
3 charge of the capital repayment obligation as pro-
4 vided in subsection (b), the provisions of section
5 213(a) and (b) of the Reclamation Reform Act of
6 1982 (96 Stat. 1269) shall be deemed to apply to
7 lands in Westlands Water District, and the owner-
8 ship and full cost pricing limitations in any provision
9 of Federal reclamation law shall not apply to lands
10 in the District notwithstanding the subsequent allo-
11 cation of construction costs or other capitalized costs
12 to the District. These exemptions shall be carried
13 out in accordance with the process set forth in the
14 Westlands Agreement.

15 (2) OTHER PROVISIONS.—Nothing in this Act is
16 intended to relieve the San Luis Unit Contractors of
17 any other obligations under Reclamation Law in-
18 cluding Restoration Fund charges pursuant to sec-
19 tion 3407(d) of Public Law 102–575.

20 **SEC. 8. TRANSFER OF TITLE TO CERTAIN FACILITIES.**

21 (a) IN GENERAL.—Upon the execution of the repay-
22 ment contract, or as soon thereafter as practicable, the
23 Secretary shall transfer to Westlands Water District title
24 to the following:

1 (1) San Luis Canal System, excluding the main
2 canal that is integrated with the California Aque-
3 duct. These appurtenant features include—

4 (A) internal water distribution system
5 within Westlands, including approximately
6 1,045 miles of buried pipeline;

7 (B) pumping plants within Westlands, in-
8 cluding—

9 (i) San Luis Canal Left and Right
10 Bank pumping plants;

11 (ii) Pumping Plants P1 through P38
12 located at the head end of the gravity
13 laterals to supply the head required for the
14 “P” laterals;

15 (iii) Pumping Plants, tanks, res-
16 ervoirs, relift pumping plants to serve
17 lands west of the San Luis Canal; and

18 (iv) Pumping Plant 7.05 off Lateral
19 7; and

20 (C) related structures, appurtenances,
21 pumping plants, pumps, motors, meters, valves,
22 tanks, transformers, and electrical equipment
23 as specifically identified through the title trans-
24 fer process of federally owned facilities, equip-
25 ment, and real property.

1 (2) Mendota Pool diversion facilities operated
2 by Westlands Water District System, including the
3 following:

4 (A) Inlet Canal from the Fresno Slough.

5 (B) Pumping plants, 6-1, 6-2, 7-1, 7-2.

6 (C) Related structures, appurtenances,
7 pumps, motors, meters, valves, tanks, trans-
8 formers, and electrical equipment as specifically
9 identified through the title transfer process of
10 federally owned facilities, equipment, and real
11 property.

12 (3) Pleasant Valley System, including the fol-
13 lowing:

14 (A) Intake canal and pipeline.

15 (B) Pleasant Valley Pumping Plant.

16 (C) Coalinga Canal, including related
17 check structures, turnouts, and headworks.

18 (D) Pleasant Valley distribution system
19 and pumping plants along the Coalinga Canal.

20 (E) Related structures, appurtenances,
21 pumps, motors, meters, valves, tanks, trans-
22 formers, and electrical equipment as specifically
23 identified through the title transfer process of
24 federally owned facilities, equipment, and real
25 property.

1 (4) Drainage collection system, including the
2 following:

3 (A) Carrier and collector pipelines, sumps,
4 and sump pumps.

5 (B) San Luis Drain from Sta 6678+45 to
6 Sta 8520+22.87. (Crossing with DMC to La-
7 guna Ave crossing.)

8 (C) Related structures, appurtenances,
9 pumps, motors, meters, valves, tanks, trans-
10 formers, and electrical equipment as specifically
11 identified through the title transfer process of
12 federally owned facilities, equipment, and real
13 property.

14 (5) Tranquillity Field Office, including the fol-
15 lowing:

16 (A) Buildings at 32650 West Adams Ave-
17 nue, Tranquillity, CA 93668.

18 (B) All related fixtures and furnishings as
19 specifically identified through the title transfer
20 process of federally owned facilities, equipment,
21 and real property.

22 (6) Huron field office, including the following:

23 (A) Buildings at 32450 South Lassen Ave-
24 nue, Huron, CA 93234.

1 (B) All related fixtures and furnishings as
2 specifically identified through the title transfer
3 process of federally owned facilities, equipment,
4 and real property.

5 (7) All real property interests held by the
6 United States in lands underlying or otherwise asso-
7 ciated with the facilities and equipment listed in this
8 subsection (a), including all fee title, easements, and
9 rights of way.

10 (b) PAYMENT OF COSTS.—Except as specifically pro-
11 vided in this Act, any transfer of title to the Pleasant Val-
12 ley Pumping Plant, the Coalinga Canal, and any associ-
13 ated facilities shall not relieve any other Project Water
14 service or repayment contractor of the requirement to pay
15 any allocated costs associated with those conveyance or
16 pumping facilities that are properly allocated to those con-
17 tractors under existing law and Project ratesetting poli-
18 cies.

19 (c) LIABILITY ON TRANSFER OF TITLE.—Upon
20 transfer of title to any facilities pursuant to subsection
21 (a), Westlands Water District shall, as a condition to such
22 transfer, formally agree as of the date of transfer to—
23 (1) hold the United States harmless and indem-
24 nify the United States for any and all claims, cost,
25 damages, and judgments of any kind arising out of

1 any act, omission, or occurrence relating to the
2 transferred facilities, except for such claims, costs,
3 damages arising from acts of negligence committed
4 by the United States or by its employees, agents, or
5 contractors, prior to the date of title transfer, for
6 which the United States is found liable under the
7 Federal Tort Claims Act; and

8 (2) assume full responsibility for correcting and
9 financing any repairs or deficiencies that may exist
10 at the time of or following title transfer.

11 (d) COMPLIANCE.—The Secretary and Westlands
12 Water District shall comply with all applicable require-
13 ments under Federal and California law before title to a
14 facility is transferred pursuant to this section.

15 **SEC. 9. COMPLIANCE WITH APPLICABLE LAW.**

16 In implementing the measures authorized by this Act,
17 the Secretary shall comply with all applicable Federal
18 laws, rules, and regulations, including the National Envi-
19 ronmental Policy Act of 1969 (42 U.S.C. 4321 et seq.)
20 and the Endangered Species Act of 1973 (16 U.S.C. 1531
21 et seq.), as necessary.

1 **SEC. 10. NO WATER SUPPLY OR FINANCIAL IMPACTS ON**
2 **OTHER CENTRAL VALLEY PROJECT CON-**
3 **TRACTORS.**

4 Implementation of this Act and the Agreements au-
5 thorized thereunder shall not—

6 (1) result in the involuntary reduction in the
7 contract water allocation to any Central Valley
8 Project long-term water service, repayment, settle-
9 ment, exchange, or refuge contractor, including con-
10 tractors in the Friant Division of the Central Valley
11 Project;

12 (2) modify, amend or affect any of the rights
13 and obligations of the parties to any Central Valley
14 Project long-term water service, repayment, settle-
15 ment, exchange, or refuge contract, including con-
16 tracts in the Friant Division of the Central Valley
17 Project; or

18 (3) alter the repayment obligation of any long-
19 term water service, repayment, or settlement con-
20 tractor receiving water or power from the Central
21 Valley Project, or shift any costs to other such con-
22 tractors that would otherwise have been properly as-
23 signable to San Luis Unit Contractors under this
24 Act, including operations and maintenance costs,
25 construction costs, or other capitalized costs allo-

1 cated to San Luis Unit Contractors after the date
2 of this Act.

3 (4) Impair the ability of the United States to
4 implement Paragraph 16 (The Water Management
5 Goal) of the Stipulation of Settlement entered by the
6 parties to *Natural Resources Defense Council, et al.*
7 *v. Rogers, et al.*, (Case NO CIV S-88-1658 (LKK/
8 GGH) E.D.Cal.) dated September 13, 2006, as au-
9 thorized to be implemented by title X of Public Law
10 111-11.

11 (5) Diminish, impair, or otherwise affect in any
12 manner any priorities for the allocation, delivery, or
13 use of water under applicable law, including any
14 purposes of use and priorities established by sections
15 3402 and 3406 of the Central Valley Project Im-
16 provement Act (Public Law 102-575; 106 Stat.
17 4706).

18 **SEC. 11. RESTORATION FUND PAYMENTS BY WESTLANDS**
19 **WATER DISTRICT.**

20 For the purpose of avoiding a shift of Central Valley
21 Project Restoration Fund payments from Westlands
22 Water District to Central Valley Project preference power
23 contractors, for any year in which the allocation of water
24 for south-of-Delta Central Valley Project long-term water
25 service contractors or repayment contractors is greater

1 than 75 percent, the Secretary shall calculate for
2 Westlands Water District a per acre foot Restoration
3 Fund payment based on a projection that Westlands
4 Water District would take delivery of the allocation made
5 to south-of-Delta Central Valley Project long-term water
6 service contractors or repayment contractors.

From: Rojewski, Cole

Sent: Monday, January 11, 2016 1:22 PM

To: 'Smith, Ryan A.'; jamaral@westlandswater.org; tbirmingham@westlandswater.org; Bernhardt, David L.

Subject: RE: Most Updated Version of Settlement Bill

From leg council? – What's best?

I can put in "except . . .", "if", or "but". Which do you mean? See:

"Provided that", "providing", "provided however"

Provided that, *providing*, and *provided however* pop up in so many documents that they must be really precise legal words having well understood meanings. Right?

Wrong. They are sloppy, antiquated, imprecise and sometimes ambiguous words. The origins of *provided that* go back to the 13th century when the words *provided that* meant it is *provided* that this is our agreement or it is *provided that* this is the law. Nowadays, the words are used variously to mean

- an exception
- a condition, or
- just another provision of the legal document.

Here is an example of two different uses of *providing* in one clause:

An employee . . . shall, upon her written request providing at least 2 weeks advance notice, be granted maternity leave . . . provided however that if . . . her ability to carry out her normal work assignments becomes limited . . .

The first *providing* is used as a condition on the employee obtaining maternity leave. The *provided however* looks like it is an exception. In fact it is quite a separate matter because it permits the employer, unilaterally, to place the employee on maternity leave in certain circumstances – it has nothing to do with the employee's right to maternity leave. The first 3 lines could be rewritten along these lines:

. . . the Employer must grant a pregnant employee maternity leave if she gives the Employer at least 2 weeks written notice . . .

Here is another *provided that* example

Provided that the efficiency of . . . shall not in any way be disrupted . . . time off work without pay may be granted . . . for the following purposes . . .

This *Provided that* is used as a condition. It can be replaced with "If".

If a document does not make clear which meaning a *provided that*, *provided however*, or *providing* has, a dispute can lead to litigation.

The guiding rule is: *Don't use "provided that" or "provided however" - use instead "except . . .", "if", or "but".*

From: Smith, Ryan A. [mailto:RSmith@BHFS.com]
Sent: Monday, January 11, 2016 11:31 AM
To: Rojewski, Cole; jamaral@westlandswater.org; tbirmingham@westlandswater.org; Bernhardt, David L.
Cc: Dunklin, Kristina
Subject: RE: Most Updated Version of Settlement Bill

Cole,

With one minor exception the bill draft looks good. Our proposed change is below:

SEC. 5. DRAINAGE IMPLEMENTATION.

The Westlands Water District shall assume all legal responsibility for the management of drainage water within its boundaries in accordance with Federal and California law, and in accordance with the Westlands Agreement; **provided that** ~~and~~ Westlands Water District shall not discharge drain water outside of its boundaries.

Thanks again for all your hard work on the legislation.

Please let me know if you have any questions.

Thanks,

Ryan

From: Rojewski, Cole [mailto:Cole.Rojewski@mail.house.gov]
Sent: Friday, January 08, 2016 2:13 PM
To: jamaral@westlandswater.org; tbirmingham@westlandswater.org; Bernhardt, David L.; Smith, Ryan A.
Cc: Dunklin, Kristina
Subject: Most Updated Version of Settlement Bill

Attached

Cole Rojewski
Chief of Staff
Rep. David G. Valadao (CA-21)

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From: Smith, Ryan A.

Sent: Monday, January 11, 2016 1:49 PM

To: Rojewski, Cole; jamaral@westlandswater.org; tbirmingham@westlandswater.org; Bernhardt, David L.

Subject: RE: Most Updated Version of Settlement Bill

Cole:

This last sentence of section 5 is not really an exception to the drainage obligation. It is more of a clarification. As a result, we struck the original Section 5(b) as drafted by legislative counsel because the heading was entitled "Exception". Therefore, I would write it as follows, adding back in subsection (b), but deleting the title "Exception":

SEC. 5. DRAINAGE IMPLEMENTATION.

- (a) In General: The Westlands Water District shall assume all legal responsibility for the management of drainage water within its boundaries in accordance with Federal and California law, and in accordance with the Westlands Agreement; and
- (b) **Drain Water:** Westlands Water District shall not discharge drain water outside of its boundaries.

Let me know if you have any questions.

Ryan Smith
Shareholder, Brownstein Hyatt Farber Schreck
1350 I Street, NW, Suite 510
Washington, DC 20005
(202) [REDACTED] - [REDACTED]

From: [Rojewski, Cole](#)

Sent: Monday, January 11, 2016 3:22 PM

To: [Smith, Ryan A.](#); [jamaral@westlandswater.org](#); [tbirmingham@westlandswater.org](#); [Bernhardt, David L.](#)

Subject: RE: Most Updated Version of Settlement Bill

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I can put in "except . . .", "if", or "but". Which do you mean? See:

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Provided that, *providing*, and *provided however* pop up in so many documents that they must be really precise legal words having well understood meanings. Right?

Wrong. They are sloppy, antiquated, imprecise and sometimes ambiguous words. The origins of *provided that* go back to the 13th century when the words *provided that* meant it is *provided* that this is our agreement or it is *provided that* this is the law. Nowadays, the words are used variously to mean

- an exception
- a condition, or
- just another provision of the legal document.

Here is an example of two different uses of *providing* in one clause:

An employee . . . shall, upon her written request providing at least 2 weeks advance notice, be granted maternity leave . . . providing however that if . . . her ability to carry out her normal work assignments becomes limited . . .

The first *providing* is used as a condition on the employee obtaining maternity leave. The *providing however* looks like it is an exception. In fact it is quite a separate matter because it permits the employer, unilaterally, to place the employee on maternity leave in certain circumstances – it has nothing to do with the employee's right to maternity leave. The first 3 lines could be rewritten along these lines:

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Provided that the efficiency of . . . shall not in any way be disrupted . . . time off work without pay may be granted . . . for the following purposes . . .

This *Provided that* is used as a condition. It can be replaced with "If".

If a document does not make clear which meaning a *provided that*, *provided however*, or *providing* has, a dispute can lead to litigation.

The guiding rule is: *Don't use "provided that" or "provided however" - use instead "except . . .", "if", or "but".*

From: Smith, Ryan A. [mailto:RSmith@BHFS.com]

Sent: Monday, January 11, 2016 11:31 AM

To: Rojewski, Cole; jamaral@westlandswater.org; tbirmingham@westlandswater.org; Bernhardt, David L.

Cc: Dunklin, Kristina

Subject: RE: Most Updated Version of Settlement Bill

Cole,

With one minor exception the bill draft looks good. Our proposed change is below:

SEC. 5. DRAINAGE IMPLEMENTATION.

The Westlands Water District shall assume all legal responsibility for the management of drainage water within its boundaries in accordance with Federal and California law, and in accordance with the Westlands Agreement; **provided that** ~~and~~ Westlands Water District shall not discharge drain water outside of its boundaries.

Thanks again for all your hard work on the legislation.

Please let me know if you have any questions.

Thanks,

Ryan

From: Rojewski, Cole [<mailto:Cole.Rojewski@mail.house.gov>]

Sent: Friday, January 08, 2016 2:13 PM

To: jamaral@westlandswater.org; tbirmingham@westlandswater.org; Bernhardt, David L.; Smith, Ryan A.

Cc: Dunklin, Kristina

Subject: Most Updated Version of Settlement Bill

Attached

Cole Rojewski

Chief of Staff

Rep. David G. Valadao (CA-21)

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From: Bernhardt, David L.
Sent: Tuesday, January 12, 2016 6:08 AM
To: Johnny Amaral (jamaral@westlandswater.org)
Subject: Sarah's Q&A

Did you look at or forward Sarah's Q&A, we need to submit it today?

Thanks,
David

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From: Rojewski, Cole

Sent: Tuesday, January 12, 2016 11:05 AM

To: tbirmingham@westlandswater.org; jamaral@westlandswater.org; Smith, Ryan A. (RSmith@BHFS.com); Bernhardt, David L. (DBernhardt@BHFS.com)

Subject: EMBARGOED: Our Press Release for this afternoon.

Thanks for your help.

Valadao Introduces Legislation to Resolve Westlands Drainage Dispute

Washington - Today, U.S. Congressman David G. Valadao (CA-21) introduced the *San Luis Unit Drainage Resolution Act* in the United States House of Representatives. This legislation would authorize a settlement of a long-standing dispute between the United States and the Westlands Water District concerning the management of drainage water within Westlands' service area in the San Luis Unit of the Central Valley Project (CVP) in California. In doing so, the legislation will save the American taxpayers billions of dollars.

Under the legislation, the United States will be relieved of potential liability of \$3.5 billion for the statutory obligation to manage drainage water. The bill includes concessions made by both the Federal Government and Westlands Water District to resolve the dispute. Westlands will dismiss its drainage related claims against the U.S. and indemnify the U.S. for any damages for landowner claims arising out of pending takings litigation against the federal government. According to the U.S. Bureau of Reclamation, the potential liability of the United States for these claims could exceed more than \$2 billion.

Importantly, no other CVP contractor will see their water supply jeopardized by the enactment of this legislation.

Congressman David Valadao stated, **"This legislation is necessary to approve and authorize the drainage settlement agreed to by both Westlands and the U.S. Department of Justice (DOJ) this past year."** He continued, **"Furthermore, enactment of this legislation has the potential to save taxpayers billions of dollars. Ensuring taxpayer dollars go towards meaningful projects, such as increased water storage rather than fighting unnecessary litigation, is the responsible and most efficient use of taxpayer dollars."**

Specifically, the legislation will:

- Settle the above litigation and relieve the U.S. of its multi-billion dollar statutory and court-ordered drainage obligation
- Require Westlands to manage drainage water within its boundaries, in accordance with the federal and California law, and provide the Department of Interior the right to cease water deliveries to Westlands if it fails to do so
- Require Westlands to indemnify the U.S. for any damages and pay compensation for landowner claims arising out of the Etchegoinberry litigation

- Relieve Westlands of its existing approximate \$375 million capital repayment obligations under its water service contract with the United States
- Require Westlands to permanently retire 100,000 acres of land within its boundaries
- Authorize the Secretary of the Interior to convert Westlands' existing water service contract entered into under section 9(e) of the 1939 to a repayment contract under section 9(d) of the same act
- Cap Westlands contract deliveries at 75% of its CVP contract amount

Congressman David G. Valadao represents the 21st Congressional District, which includes Kings County and portions of Fresno, Tulare, and Kern Counties.

###

Cole Rojewski
Chief of Staff
Rep. David G. Valadao (CA-21)

From: Bernhardt, David L.
Sent: Friday, January 15, 2016 9:56 AM
To: Johnny Amaral
Subject: Monday's call

Monday is MLK day. I'm not sure you're on duty or off, but you might want to send an email out either cancelling or confirming Monday's call.

David Bernhardt

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From: Johnny Amaral
Sent: Friday, January 15, 2016 9:56 AM
To: Bernhardt, David L.
Subject: Re: Monday's call

Good catch.

Best,

Johnny Amaral

> On Jan 15, 2016, at 8:55 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

>

> Monday is MLK day. I'm not sure you're on duty or off, but you might want to send an email out either cancelling or confirming Monday's call.

>

> David Bernhardt

>

>

>

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From: Johnny Amaral

Sent: Friday, January 15, 2016 10:35 AM

To: David Bernhardt; Dennis Cardoza; Dennis Cardoza; 'Ryan A. Smith'; Catherine Karen; Ed Manning; Carolyn Jensen; Mike Burns

Subject: Monday morning call CANCELLED

To observe the Martin Luther King, Jr. Day Holiday.

For your motivation, below are my three FAVORITE MLK quotes.

“In the end, we will remember not the words of our enemies, but the silence of our friends” – MLK

“And there comes a time when one must take a position that is neither safe, nor politic, nor popular, but he must do it because conscience tells him it is right” – MLK

“The hottest place in hell is reserved for those who remain neutral in times of great conflict” - MLK

From: Tom Birmingham
Sent: Tuesday, January 19, 2016 4:36 PM
To: 'Bernhardt, David L.'
Subject: FW: Meeting, 1/22

FYI

From: Ahmadi, Shaeda (Feinstein) [mailto:Shaeda_Ahmadi@feinstein.senate.gov]
Sent: Tuesday, January 19, 2016 12:24 PM
To: Tbirmingham@westlandswater.org
Subject: Meeting, 1/22

Hi Tom, apologies for the multiple contacts but I also left a voicemail for you earlier today at your office. Due to the inclement weather here in DC (we're expecting about 2 feet on Friday), the Senator has decided to move the meeting to our San Francisco office at 1pm. Are you available to make it?

Thanks,
Shaeda

Shaeda L. Ahmadi
Scheduler
Office of U.S. Senator Dianne Feinstein
202.224.3841



From: Tom Birmingham
Sent: Tuesday, January 19, 2016 6:37 PM
To: John Watts
Subject: Friday's Meeting

John,

Please ask Senator Feinstein if it would be permissible for David Bernhardt to accompany me to Friday's meeting. As you know, David has the confidence of many members of the House of Representatives, and he will play a key role in persuading those members to accept operational language.

I did not make this request earlier because David is on the west coast this week. Inasmuch as the location of the meeting has been changed to San Francisco, it is now possible for David to attend.

I understand if it is Senator Feinstein's preference to limit attendance at the meeting, but I believe David's participation would be valuable.

Thank you,
Tom

Sent from my iPhone

From: Johnny Amaral
Sent: Wednesday, January 20, 2016 11:10 AM
To: Tom Birmingham; David Bernhardt
Subject: Friday

Can we put our heads together sometime before the meeting in San Francisco? Maybe conference call sometime tomorrow?

From: Bernhardt, David L.
Sent: Wednesday, January 20, 2016 11:41 AM
To: kclark@westlandswater.org
CC: Dennis Nuxoll
Subject: Tom B

Karen: Dennis is with Western Growers and he is trying to see if his boss and Tom B could visit before one on Friday at a meeting in SF they are both slated to attend. Can you work with Dennis to see if something can be worked out?

Thanks,
David

David Bernhardt

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From: Karen Clark
Sent: Wednesday, January 20, 2016 11:48 AM
To: Bernhardt, David L.
Subject: Re: Tom B

Hi David,

Yes, I will be happy to schedule something. Would you forward me Dennis' contact information?

Sent from my iPhone

> On Jan 20, 2016, at 10:40 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

>

> Karen: Dennis is with Western Growers and he is trying to see if his boss and Tom B could visit before one on Friday at a meeting in SF they are both slated to attend. Can you work with Dennis to see if something can be worked out?

>

> Thanks,

> David

>

> David Bernhardt

>

>

>

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From: Bernhardt, David L.
Sent: Wednesday, January 20, 2016 11:51 AM
To: Karen Clark
CC: Dennis Nuxoll
Subject: Re: Tom B

I'm sorry I meant to include his email. Here you go.

David Bernhardt

> On Jan 20, 2016, at 10:48 AM, Karen Clark <kclark@westlandswater.org> wrote:

>

>

> Hi David,

>

> Yes, I will be happy to schedule something. Would you forward me Dennis' contact information?

>

> Sent from my iPhone

>

>> On Jan 20, 2016, at 10:40 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

>>

>> Karen: Dennis is with Western Growers and he is trying to see if his boss and Tom B could visit before one on Friday at a meeting in SF they are both slated to attend. Can you work with Dennis to see if something can be worked out?

>>

>> Thanks,

>> David

>>

>> David Bernhardt

>>

>>

>>

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>

From: Tom Birmingham
Sent: Wednesday, January 20, 2016 4:02 PM
To: 'David Bernhardt'
CC: 'Karen Clark'
Subject: Meeting with Nassif

David,

I spoke with Tom Nassif, and we agreed to meet at 10:30 a.m. in the lobby of the building in which Senator Feinstein has her office. I hope you can join us.

Tom

From: Tom Birmingham
Sent: Wednesday, January 20, 2016 4:07 PM
To: 'Johnny Amaral'; 'David Bernhardt'
Subject: RE: Friday

I can do a conference call anytime on Thursday. Let me know what time works for you.

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Wednesday, January 20, 2016 10:10 AM
To: Tom Birmingham <tbirmingham@westlandswater.org>; David Bernhardt <dbernhardt@bhfs.com>
Subject: Friday

Can we put our heads together sometime before the meeting in San Francisco? Maybe conference call sometime tomorrow?

From: Bernhardt, David L.
Sent: Wednesday, January 20, 2016 4:08 PM
To: Tom Birmingham
CC: Karen Clark
Subject: Re: Meeting with Nassif

Great. I'll be there.

David Bernhardt

On Jan 20, 2016, at 3:02 PM, Tom Birmingham <tbirmingham@westlandswater.org> wrote:

David,

I spoke with Tom Nassif, and we agreed to meet at 10:30 a.m. in the lobby of the building in which Senator Feinstein has her office. I hope you can join us.

Tom

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From: Johnny Amaral
Sent: Wednesday, January 20, 2016 4:48 PM
To: 'Tom Birmingham'; 'David Bernhardt'
Subject: RE: Friday

Thanks. I have an 8 am breakfast tomorrow, followed by what im sure will be a very pleasant root canal at 10 am. Does noon work for you both?

From: Tom Birmingham [mailto:tbirmingham@westlandswater.org]
Sent: Wednesday, January 20, 2016 3:07 PM
To: 'Johnny Amaral'; 'David Bernhardt'
Subject: RE: Friday

I can do a conference call anytime on Thursday. Let me know what time works for you.

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Wednesday, January 20, 2016 10:10 AM
To: Tom Birmingham <tbirmingham@westlandswater.org>; David Bernhardt <dbernhardt@bhfs.com>
Subject: Friday

Can we put our heads together sometime before the meeting in San Francisco? Maybe conference call sometime tomorrow?

From: Bernhardt, David L.
Sent: Wednesday, January 20, 2016 4:51 PM
To: Johnny Amaral
CC: Tom Birmingham
Subject: Re: Friday

Works for me

David Bernhardt

On Jan 20, 2016, at 3:48 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

Thanks. I have an 8 am breakfast tomorrow, followed by what im sure will be a very pleasant root canal at 10 am. Does noon work for you both?

From: Tom Birmingham [<mailto:tbirmingham@westlandswater.org>]
Sent: Wednesday, January 20, 2016 3:07 PM
To: 'Johnny Amaral'; 'David Bernhardt'
Subject: RE: Friday

I can do a conference call anytime on Thursday. Let me know what time works for you.

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Wednesday, January 20, 2016 10:10 AM
To: Tom Birmingham <tbirmingham@westlandswater.org>; David Bernhardt <dbernhardt@bhfs.com>
Subject: Friday

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From: Johnny Amaral
Sent: Wednesday, January 20, 2016 4:53 PM
To: 'Bernhardt, David L.'
CC: 'Tom Birmingham'
Subject: RE: Friday

Ok. Tom, can we use the usual call in number and code?

From: Bernhardt, David L. [mailto:DBernhardt@BHFS.com]
Sent: Wednesday, January 20, 2016 3:51 PM
To: Johnny Amaral
Cc: Tom Birmingham
Subject: Re: Friday

Works for me

David Bernhardt

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To: 'Johnny Amaral'; 'David Bernhardt'
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From: Tom Birmingham
Sent: Wednesday, January 20, 2016 10:57 PM
To: Johnny Amaral
CC: Bernhardt, David L.
Subject: Re: Friday

Yes, we can use the regular number at noon.

Sent from my iPhone

On Jan 20, 2016, at 3:52 PM, "Johnny Amaral" <jamaral@westlandswater.org> wrote:

Ok. Tom, can we use the usual call in number and code?

From: Bernhardt, David L. [<mailto:DBernhardt@BHFS.com>]
Sent: Wednesday, January 20, 2016 3:51 PM
To: Johnny Amaral
Cc: Tom Birmingham
Subject: Re: Friday

Works for me

David Bernhardt

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Sent: Wednesday, January 20, 2016 3:07 PM
To: 'Johnny Amaral'; 'David Bernhardt'
Subject: RE: Friday

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Sent: Wednesday, January 20, 2016 10:10 AM
To: Tom Birmingham <tbirmingham@westlandswater.org>; David Bernhardt <dbernhardt@bhfs.com>
Subject: Friday

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have received this email in error, please notify us immediately by calling (303)-223-1300 and delete the message. Thank you.

From: Karen Clark
Sent: Thursday, January 21, 2016 9:21 AM
To: Cheryl Hall
CC: dnuxoll@WGA.COM
Subject: FW: Meeting with Nassif

Hello Cheryl,

After all our great planning, our bosses spoke with each other and made their own plans. I guess we are all confirmed for 10:30 a.m. in the lobby of Senator Feinstein's office. Feel free to contact me if you have any questions.

~Karen

Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) [REDACTED]
(f) 559.241.6277
Email: kclark@westlandswater.org

From: Tom Birmingham [mailto:tbirmingham@westlandswater.org]
Sent: Wednesday, January 20, 2016 3:02 PM
To: 'David Bernhardt'
Cc: 'Karen Clark'
Subject: Meeting with Nassif

David,

I spoke with Tom Nassif, and we agreed to meet at 10:30 a.m. in the lobby of the building in which Senator Feinstein has her office. I hope you can join us.

Tom

From: Karen Clark
Sent: Thursday, January 21, 2016 9:23 AM
To: Cheryl Hall
CC: dnuxoll@WGA.COM
Subject: RE: Meeting with Nassif

One more thing....David Bernhardt will attend also.

~Karen

Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) [REDACTED]
(f) 559.241.6277
Email: kclark@westlandswater.org

From: Karen Clark [<mailto:kclark@westlandswater.org>]
Sent: Thursday, January 21, 2016 8:21 AM
To: Cheryl Hall (chall@WGA.com)
Cc: 'dnuxoll@WGA.COM'
Subject: FW: Meeting with Nassif

Hello Cheryl,

After all our great planning, our bosses spoke with each other and made their own plans. I guess we are all confirmed for 10:30 a.m. in the lobby of Senator Feinstein's office. Feel free to contact me if you have any questions.

~Karen

Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) [REDACTED]
(f) 559.241.6277
Email: kclark@westlandswater.org

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Sent: Wednesday, January 20, 2016 3:02 PM
To: 'David Bernhardt'
Cc: 'Karen Clark'
Subject: Meeting with Nassif

David,

I spoke with Tom Nassif, and we agreed to meet at 10:30 a.m. in the lobby of the building in which Senator Feinstein has her office. I hope you can join us.

Tom

From: Cheryl Hall
Sent: Thursday, January 21, 2016 9:25 AM
To: Karen Clark
CC: Dennis Nuxoll
Subject: RE: Meeting with Nassif

Yes, that's what I understood. Thanks for the follow up.

Cheryl

From: Karen Clark [mailto:kclark@westlandswater.org]
Sent: Thursday, January 21, 2016 8:21 AM
To: Cheryl Hall <chall@WGA.com>
Cc: Dennis Nuxoll <dnuxoll@WGA.COM>
Subject: FW: Meeting with Nassif

Hello Cheryl,

After all our great planning, our bosses spoke with each other and made their own plans. I guess we are all confirmed for 10:30 a.m. in the lobby of Senator Feinstein's office. Feel free to contact me if you have any questions.

~Karen

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P.O. Box 6056
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(f) 559.241.6277
Email: kclark@westlandswater.org

From: Tom Birmingham [mailto:tbirmingham@westlandswater.org]
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To: 'David Bernhardt'
Cc: 'Karen Clark'
Subject: Meeting with Nassif

David,

I spoke with Tom Nassif, and we agreed to meet at 10:30 a.m. in the lobby of the building in which Senator Feinstein has her office. I hope you can join us.

Tom

From: Rojewski, Cole

Sent: Thursday, January 21, 2016 1:33 PM

To: Tom Birmingham; David L. Bernhardt; Johnny Amaral

CC: Dunklin, Kristina

Subject: Fwd: Sen. Feinstein's drought bill discussion draft

Attachments: Drought Bill Discussion Draft, 1.21.16.pdf; ATT00001.htm; Drought bill discussion draft -- eight water supply benefits (1.21.16).pdf; ATT00002.htm; Drought bill discussion draft, summary (1.21.16).pdf; ATT00003.htm

Please find it attached. Let me know your thoughts.

Begin forwarded message:

DISCUSSION DRAFT

Title: To provide short-term water supplies to drought-stricken California and provide for long-term investments in drought resiliency throughout the Western United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title.—This Act may be cited as the “California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act”.

(b) Table of Contents.—The table of contents of this Act is as follows:

Sec.1.Short title; table of contents.

Sec.2.Purposes.

Sec.3.Findings.

Sec.4.Definitions.

TITLE I—LONG-TERM IMPROVEMENTS FOR WESTERN STATES SUBJECT TO DROUGHT

Subtitle A—Assistance for Drought-stricken Communities

Sec.101. WaterSMART reauthorization and assistance for drought-stricken communities and.

Sec.102.Utilizing State revolving funds for areas with inadequate water supplies.

Subtitle B—Storage Provisions

Sec.111.Definitions.

Sec.112.Water storage project construction.

Sec.113.Reservoir operation improvement.

Sec.114.Findings.

Sec.115.Studies.

Sec.116.Losses caused by construction and operation of water storage projects.

DISCUSSION DRAFT

Subtitle C—Desalination, Water Reuse and Recycling, and Conservation

Sec.121.Water recycling and desalination projects.

Sec.122.Reauthorization of Water Desalination Act.

Sec.123.New water recycling and reuse projects.

Sec.124.Promoting water efficiency with WaterSense.

Subtitle D—Reclamation Infrastructure Finance and Innovation

Sec.131.Purposes.

Sec.132.Definitions.

Sec.133.Authority to provide assistance.

Sec.134.Applications.

Sec.135.Eligibility for assistance.

Sec.136.Determination of eligibility and project selection.

Sec.137.Secured loans.

Sec.138.Program administration.

Sec.139.State and local permits.

Sec.140.Regulations.

Sec.141.Funding.

TITLE II—LISTED SPECIES AND WILDLIFE

Sec.201.Actions to benefit endangered fish populations.

Sec.202.Actions to benefit refuges.

Sec.203.Non-Federal program to protect native anadromous fish in Stanislaus River.

Sec.204.Pilot projects to implement Calfed invasive species program.

TITLE III—CALIFORNIA EMERGENCY DROUGHT RELIEF AND OPERATIONAL FLEXIBILITY

Sec.301.Taking into account increased real-time monitoring and updated science.

Sec.302.Emergency operations.

DISCUSSION DRAFT

1 Sec.303.Temporary operational flexibility to capture peak flows from
2 winter storms.

3 Sec.304.Emergency environmental reviews.

4 Sec.305.Level of detail required for analysis.

5 TITLE IV—WATER RIGHTS

6 Sec.401.Offset for State Water Project.

7 Sec.402.Area of origin and water rights protections.

8 Sec.403.No redirected adverse impacts.

9 Sec.404.Allocations for Sacramento Valley water service contractors.

10 TITLE V—MISCELLANEOUS PROVISIONS

11 Sec.501.Authorized service area.

12 Sec.502.Oversight over and public input into Restoration Fund activities.

13 Sec.503.Basin studies.

14 Sec.504.Technical and modeling assistance.

15 Sec.505.Report on results of water usage.

16 Sec.506.Additional storage at New Melones.

17 Sec.507.Contracting authorities.

18 Sec.508.Single annual report.

19 TITLE VI—OFFSETS

20 Sec.601.Deauthorization of inactive projects.

21 Sec.602.Accelerated revenue, repayment, and surface water storage
22 enhancement.

23 TITLE VII—DURATION AND EFFECT ON 24 EXISTING OBLIGATIONS

25 Sec.701.Savings clause.

26 Sec.702.Termination.

27 SEC. 2. PURPOSES.

28 The purposes of this Act are—

29 (1) to help communities most at risk of running out of clean water;

30 (2) to provide funding and support for long-term solutions
31 including water storage, desalination and recycling;

DISCUSSION DRAFT

- 1 (3) to protect threatened and endangered species; and
- 2 (4) to facilitate the movement of water to communities most in
- 3 need while adhering to all environmental laws.

4 SEC. 3. FINDINGS.

5 Congress finds that—

- 6 (1) California is experiencing one of the most severe droughts on
- 7 record, with the snowpack at the lowest levels in 500 years;
- 8 (2) Governor Jerry Brown declared a drought state of emergency
- 9 on January 17, 2014, and subsequently imposed strict water
- 10 reductions on communities throughout the State;
- 11 (3) the drought constitutes a serious emergency that poses
- 12 immediate and severe risks to—
 - 13 (A) human health and safety;
 - 14 (B) economic security; and
 - 15 (C) the environment;
- 16 (4) wells that provide households with clean water are drying up as
- 17 the State entered its fourth consecutive summer of drought, with
- 18 approximately 2,591 wells statewide identified as critical or dry,
- 19 affecting an estimated 12,955 residents, many in the Central Valley;
- 20 (5) rural and disadvantaged communities have been hardest hit,
- 21 placing great strain on drinking water supplies in the Southern San
- 22 Joaquin Valley—
 - 23 (A) 69 communities in Southern San Joaquin Valley have
 - 24 reported significant water supply and quality issues; and
 - 25 (B) East Porterville is particularly hard hit, with 40 percent, or
 - 26 3,000, of its residents, without running water;
 - 27 (6) the drought has resulted in many lost jobs including more than
 - 28 21,000 seasonal and part-time agricultural jobs—resulting in a 10.9
 - 29 percent unemployment rate in the Central Valley, double the
 - 30 statewide unemployment rate of 5.7 percent, as of December 15,
 - 31 2015;
 - 32 (7) thousands of families have been affected, placing ever greater
 - 33 demands on food banks and other relief organizations, and as of
 - 34 December 21, 2015—
 - 35 (A) the California Department of Social Services Drought
 - 36 Food Assistance Program has provided more than 1,000,000
 - 37 boxes to food banks in affected communities with high levels of
 - 38 unemployment; and

DISCUSSION DRAFT

(B) nearly 72 percent of the food distributions have occurred in the Tulare Basin counties of Fresno, Kern, Kings, and Tulare;

(8) 2015 statewide economic costs are estimated at \$2,700,000, including but not limited to—

(A) the loss of \$900,000,000 in crop revenue;

(B) the loss of \$350,000,000 in dairy and other livestock value; and

(C) an increase of \$590,000,000 in groundwater pumping costs;

(9) 1,032,508 acres in California's Central Valley were fallowed in 2015, a 626,512 acre increase from 2011;

(10) the drought is imperiling California's forests, which provide important ecological, economic, and cultural benefits to the State, and among the effects of the drought—

(A) loss of 50,000,000 large trees due to stress from lack of water;

(B) 88,000,000 trees, covering 26,000,000 acres of California forestland, experienced losses of canopy cover since 2011, threatening ecosystem destruction and loss of animal habitat; and

(C) 6,337 fires covering 307,598 acres occurred in 2015;

(11) fish continue to be threatened by the extended drought, compounding effects on two endangered species, further reducing river flows and increasing water temperatures—

(A) Delta smelt abundance is at a historic low, as evidenced by long-term monitoring surveys;

(B) the abundance of the last remaining population of wild Sacramento River winter run Chinook salmon continue to decline, with mortality rates between 95 percent and 97 percent over the past 2 years;

(C) wildlife has also been affected, with water deliveries to wildlife refuges under the Central Valley Project Improvement Act reduced by 25 percent in the north-of-Delta region and 35 percent in the south-of-Delta region; and

(D) these reduced water supplies have contributed to a decline of the Pacific Flyway, a migratory route for waterfowl that spans from Alaska to South America—

(i) a reduction in water supplies has led to a significant decline in flooded rice fields, a vital habitat for migratory birds. Only one-third of the usual acres of rice fields were

DISCUSSION DRAFT

1 flooded in 2015; and

2 (ii) the reduction of available habitat for migratory
3 waterfowl contributed to an increased risk of disease in the
4 remaining wetlands due to overcrowding of birds;

5 (12) subsidence in California is occurring at more than 12 inches
6 per year, caused in part by an increase in groundwater pumping of
7 more than 6,000,000 acre feet. Some areas in the Central Valley have
8 sunk as much as 2 inches per month, and the damage from
9 subsidence is wide-ranging—

10 (A) roads, bridges, building foundations, pipelines, and other
11 infrastructure have been damaged;

12 (B) vital aquifers have been depleted;

13 (C) vital levees have sustained cracks and ruptures; and

14 (D) shallow aquifers have become vulnerable to
15 contamination as surface water infiltrates through fissures in the
16 soil;

17 (13) California homes, cities, wildlife, businesses and farming
18 need more water than is available today, particularly in the San
19 Joaquin Valley;

20 (14) Congress recognizes that providing more water to those who
21 need it most will require science-based management of water
22 supplies and fish and wildlife resources, including—

23 (A) alternative management strategies, such as removing
24 nonnative species, enhancing habitat, monitoring fish movement
25 and location in real-time, and improving water quality in the
26 Delta, which could contribute significantly to protecting and
27 recovering those endangered fish species, and at potentially
28 lower costs to water supplies than solely focusing on restrictions
29 on water exports; and

30 (B) updated science and improved monitoring tools that
31 provide Federal and State agencies with better information about
32 conditions and operations that may or may not lead to high
33 salvage events that jeopardize fish populations; and

34 (15) given the dire effects outlined above and the potential for
35 continued harm, this emergency requires—

36 (A) immediate and credible action that takes into account the
37 complexity and importance of the water system to the State; and

38 (B) policies that do not position stakeholders against one
39 another, which in the past has led to costly litigation that
40 benefits no one and prevents any real solutions.

DISCUSSION DRAFT

SEC. 4. DEFINITIONS.

In this Act:

(1) ASSISTANT ADMINISTRATOR.—The term “Assistant Administrator” means the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration.

(2) CENTRAL VALLEY PROJECT.—The term “Central Valley Project” has the meaning given the term in section 3403 of the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4707).

(3) COMMISSIONER.—The term “Commissioner” means the Commissioner of Reclamation.

(4) DELTA.—The term “Delta” means the Sacramento-San Joaquin Delta and the Suisun Marsh (as defined in section 12220 of the California Water Code and section 29101 of the California Public Resources Code (as in effect on the date of enactment of this Act)).

(5) DELTA SMELT.—The term “Delta smelt” means the fish species with the scientific name *Hypomesus transpacificus*.

(6) DIRECTOR.—The term “Director” means the Director of the United States Fish and Wildlife Service.

(7) LISTED FISH SPECIES.—The term “listed fish species” means—

(A) any natural origin steelhead, natural origin genetic spring run Chinook, or genetic winter run Chinook salmon (including any hatchery steelhead or salmon population within the evolutionary significant unit or a distinct population segment); and

(B) Delta smelt.

(8) MAXIMIZE.—The term “maximize”, with respect to fish and water supply benefits, means to use improved real-time information to achieve the dual goals of maximizing water exports to Central Valley Project and State Water Project contractors while increasing fish protections when needed, in accordance with—

(A) the salmonid biological opinion;

(B) the smelt biological opinion; and

(C) applicable law.

(9) OMR.—The term “OMR” means the Old and Middle River in the Delta.

(10) OMR FLOW.—The term “OMR flow” means Old and Middle River flow of any given measurement, expressed in cubic feet per second, as described in—

DISCUSSION DRAFT

1 (A) the smelt biological opinion; and

2 (B) the salmonid biological opinion.

3 (11) RECLAMATION STATE.—The term “Reclamation State” means
4 any of the States of—

5 (A) Arizona;

6 (B) California;

7 (C) Colorado;

8 (D) Idaho;

9 (E) Kansas;

10 (F) Montana;

11 (G) Nebraska;

12 (H) Nevada;

13 (I) New Mexico;

14 (J) North Dakota;

15 (K) Oklahoma;

16 (L) Oregon;

17 (M) South Dakota;

18 (N) Texas;

19 (O) Utah;

20 (P) Washington; and

21 (Q) Wyoming.

22 (12) SALMONID BIOLOGICAL OPINION.—

23 (A) IN GENERAL.—The term “salmonid biological opinion”
24 means the biological and conference opinion of the National
25 Marine Fisheries Service dated June 4, 2009, regarding the long-
26 term operation of the Central Valley Project and the State Water
27 Project, and successor biological opinions.

28 (B) INCLUSIONS.—The term “salmonid biological opinion”
29 includes the operative incidental take statement of the opinion
30 described in subparagraph (A).

31 (13) SMELT BIOLOGICAL OPINION.—

32 (A) IN GENERAL.—The term “smelt biological opinion” means
33 the biological opinion dated December 15, 2008, regarding the
34 coordinated operation of the Central Valley Project and the State
35 Water Project, and successor biological opinions.

DISCUSSION DRAFT

(B) INCLUSIONS.—The term “smelt biological opinion” includes the operative incidental take statement of the opinion described in subparagraph (A).

(14) STATE WATER PROJECT.—The term “State Water Project” means the water project described in chapter 5 of part 3 of division 6 of the California Water Code (sections 11550 et seq.) (as in effect on the date of enactment of this Act) and operated by the California Department of Water Resources.

TITLE I—LONG-■■■■■ IMPROVEMENTS FOR WESTERN STATES SUBJECT TO DROUGHT

Subtitle A—Assistance for Drought-stricken Communities

SEC. 101. WATERSMART REAUTHORIZATION AND ASSISTANCE FOR DROUGHT-STRICKEN COMMUNITIES

.

(a) Findings.—Congress finds that—

(1) across the United States, more than 90 percent of the community water systems serve populations of less than 10,000 individuals;

(2) the number of dry wells continues to increase as the State of California enters the fourth consecutive summer of drought, with approximately 2,591 wells statewide identified as critical or dry, which affects an estimated 12,955 residents, with 2,444 of the dry wells concentrated in the inland regions within the Central Valley;

(3) many areas of the State of California are disproportionately impacted by drought because the areas are heavily dependent or completely reliant on groundwater from basins that are in overdraft and in which the water table declines year after year or from basins that are contaminated; and

(4) those communities throughout the State of California have been impacted by the presence of naturally occurring arsenic in the groundwater among other contaminants, as a result of higher concentration of contaminants in the water.

(b) Amendment.—Section 9504 of the Omnibus Public Land Management Act of 2009 (42 U.S.C. 10364) is amended—

DISCUSSION DRAFT

1 (1) by redesignating subsections (b) through (e) as subsections (d)
2 through (f), respectively;

3 (2) by inserting after subsection (b) the following:

4 “(c) Water Storage, Integrated Regional Water Management,
5 Reclamation, and Recycling Projects.—

6 “(1) IN GENERAL.—The Secretary of the Interior is authorized to
7 enter into cost shared financial assistance and other long-term
8 agreements with non-Federal participants to advance the planning,
9 design, and construction of non-Federal permanent water storage and
10 conveyance facilities, projects for the reclamation and reuse of
11 municipal, industrial, domestic and agricultural wastewater, and
12 naturally impaired ground and surface waters, groundwater recharge,
13 and other water management improvement projects for which the
14 Secretary of the Interior is authorized under this subtitle to assist an
15 applicant in the planning, design, and construction.

16 “(2) AUTHORITY TO PROVIDE ASSISTANCE.—The Secretary of the
17 Interior may provide financial assistance under this subtitle to carry
18 out projects within—

19 “(A) any Reclamation State, including—

20 “(i) Arizona;

21 “(ii) California;

22 “(iii) Colorado;

23 “(iv) Idaho;

24 “(v) Kansas;

25 “(vi) Montana;

26 “(vii) Nebraska;

27 “(viii) Nevada;

28 “(ix) New Mexico;

29 “(x) North Dakota;

30 “(xi) Oklahoma;

31 “(xii) Oregon;

32 “(xiii) South Dakota;

33 “(xiv) Texas;

34 “(xv) Utah;

35 “(xvi) Washington;

36 “(xvii) Wyoming; and

DISCUSSION DRAFT

1 “(B) the States of Alaska and Hawaii.

2 “(3) PRIORITY.—In providing financial assistance under this
3 section, the Secretary of the Interior shall give priority to storage,
4 conveyance, and water management improvement projects that—

5 “(A) ensure the efficient and beneficial use of water or reuse
6 of recycled water;

7 “(B) use integrated and coordinated water management on a
8 watershed or regional scale;

9 “(C) increase the availability of usable water supplies in a
10 watershed or region to benefit individuals, the economy, and the
11 environment and include adaptive measures needed to address
12 climate change and future demands;

13 “(D) where practicable, provide flood control or recreation
14 benefits and include the development of incremental
15 hydroelectric power generation; and

16 “(E) generate environmental benefits, such as benefits to
17 fisheries, wildlife and habitat, water quality, water-dependent
18 ecological systems, and water supply benefits to agricultural and
19 urban water users.

20 “(4) FEDERAL COST SHARE.—The Federal share of the cost of a
21 project under this subsection shall be—

22 “(A) an amount equal to the lesser of—

23 “(i) 25 percent of total costs; and

24 “(ii) \$20,000,000 (adjusted for inflation); and

25 “(B) nonreimbursable.

26 “(5) IN-KIND CONTRIBUTIONS.—The non-Federal share of the cost
27 of a project under this subsection may include in-kind contributions
28 to the planning, design, and construction of the project.

29 “(6) TITLE; OPERATION AND MAINTENANCE COSTS.—The non-
30 Federal entity entering into a financial assistance agreement under
31 this subsection shall—

32 “(A) hold title in and to all facilities constructed under this
33 subsection, and

34 “(B) be solely responsible for the costs of operating and
35 maintaining those facilities.”; and

36 (3) in subsection (f) (as redesignated by paragraph (1)), by striking
37 “\$350,000,000” and inserting “\$500,000,000”.

38 (c) Amendment.—Section 9508 of the Omnibus Public Land
39 Management Act of 2009 (42 U.S.C. 10368) is amended—

DISCUSSION DRAFT

1 (1) by redesignating subsections (b) through (e) as subsections (c)
2 through (f), respectively; and

3 (2) by inserting after subsection (a) the following:

4 “(b) Additional Assistance for Communities Without Access to
5 Adequate Water.—

6 “(1) IN GENERAL.—To assist disadvantaged communities that have
7 experienced a significant decline in quantity or quality of drinking
8 water, and to obtain or maintain adequate quantities of water that
9 meet the standards set by the Federal Water Pollution Control Act (33
10 U.S.C. 1251 et seq.), the Secretary of the Interior is authorized to
11 provide grants for communities—

12 “(A) that are unable to meet the primary water quality
13 standards under that Act; or

14 “(B) the local private or public water supply of which has
15 been lost or severely diminished due to drought conditions.

16 “(2) ELIGIBLE COMMUNITIES.—To be eligible to receive a grant
17 under this subsection, a community shall carry out a project described
18 in paragraph (3), the service area of which—

19 “(A) shall not be located in any city or town with a population
20 of more than 60,000 residents; and

21 “(B) has a median household income of less than 100 percent
22 of the nonmetropolitan median household income of the State.

23 “(3) ELIGIBLE PROJECTS.—Projects eligible for this program may
24 be used for—

25 “(A) emergency water supplies;

26 “(B) point of use treatment and point of entry systems;

27 “(C) distributed treatment facilities;

28 “(D) construction of new water source facilities including
29 wells and connections to existing systems;

30 “(E) water distribution facilities;

31 “(F) connection fees to existing systems;

32 “(G) assistance to households to connect to water facilities;
33 and

34 “(H) any combination of activities described in subparagraphs
35 (A) through (G).

36 “(4) PRIORITIZATION.—In determining priorities for funding
37 projects, the Secretary of the Interior shall take into consideration—

38 “(A) where water outages—

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- 1 “(i) are most serious; and
2 “(ii) pose the greatest threat to public health and safety;
3 and
4 “(B) whether the applicant has the ability to qualify for
5 alternative funding sources.
6 “(5) MAXIMUM AMOUNT.—The amount of a grant provided under
7 this section may be made up to 100 percent of costs, including—
8 “(A) initial operation costs incurred for start-up and testing of
9 project facilities;
10 “(B) components to ensure such facilities and components are
11 properly operational; and
12 “(C) costs of operation or maintenance incurred subsequent to
13 placing the facilities or components into service.”.

14 SEC. 102. UTILIZING STATE REVOLVING 15 FUNDS FOR AREAS WITH INADEQUATE 16 WATER SUPPLIES.

- 17 (a) In General.—For the 5-year period beginning on the date of
18 enactment of this Act, in allocating amounts to California from the Clean
19 Water State Revolving Fund established under title VI of the Federal
20 Water Pollution Control Act (33 U.S.C. 1381 et seq.) and the Drinking
21 Water State Revolving Fund established under section 1452 of the Safe
22 Drinking Water Act (42 U.S.C. 300j–12) for any project eligible to receive
23 assistance under section 603 of the Federal Water Pollution Control Act
24 (33 U.S.C. 1383) or section 1452(a)(2) of the Safe Drinking Water Act (42
25 U.S.C. 300j–12(a)(2)), respectively, that the State of California determines
26 will provide additional water supplies most expeditiously to areas that are
27 at risk of having an inadequate supply of water for public health and safety
28 purposes or to improve resiliency to drought, the Administrator of the
29 Environmental Protection Agency shall—
30 (1) require the State of California to review and prioritize funding;
31 (2) make a finding on any request for a waiver received from the
32 State of California by not later than 30 days after the date of
33 conclusion of the informal public comment period pursuant to section
34 436(c) of division G of Public Law 113–76 (128 Stat. 347); and
35 (3) authorize, at the request of the State of California, 40-year
36 financing for assistance under section 603(d)(2) of the Federal Water
37 Pollution Control Act (33 U.S.C. 1383(d)(2)) or section 1452(f)(2) of
38 the Safe Drinking Water Act (42 U.S.C. 300j–12(f)(2)), as applicable.
39 (b) Effect of Section.—Nothing in this section authorizes the

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Administrator of the Environmental Protection Agency to modify any funding allocation, funding criteria, or other requirement relating to State water pollution control revolving funds established under title VI of the Federal Water Pollution Control Act (33 U.S.C. 1381 et seq.) or the State drinking water treatment revolving loan funds established under section 1452 of the Safe Drinking Water Act (42 U.S.C. 300j–12) for any State other than California.

Subtitle B—Storage Provisions

SEC. 111. DEFINITIONS.

In this subtitle:

(1) **FEDERALLY OWNED STORAGE PROJECT.**—The term “federally owned storage project” means any project involving a surface water storage facility in a Reclamation State—

(A) to which the United States holds title; and

(B) that was authorized to be constructed, operated, and maintained pursuant to the reclamation laws.

(2) **STATE-LED STORAGE PROJECT.**—The term “State-led storage project” means any project in a Reclamation State that—

(A) involves a groundwater or surface water storage facility constructed, operated, and maintained by any State, department of a State, subdivision of a State, or public agency organized pursuant to State law; and

(B) provides a benefit in meeting any obligation under Federal law (including regulations).

SEC. 112. WATER STORAGE PROJECT CONSTRUCTION.

(a) **Federally Owned Storage Projects.**—

(1) **AGREEMENTS.**—On the request of any State, any department, agency, or subdivision of a State, or any public agency organized pursuant to State law, the Secretary of the Interior may negotiate and enter into an agreement on behalf of the United States for the design, study, and construction or expansion of any federally owned storage project in accordance with this section.

(2) **FEDERAL COST SHARE.**—Subject to the requirements of this subsection, the Secretary of the Interior may participate in a federally owned storage project in an amount equal to not more than 50 percent of the total cost of the federally owned storage project.

(3) **COMMENCEMENT.**—The construction of a federally owned

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storage project that is the subject of an agreement under this subsection shall not commence until the Secretary of the Interior—

(A) determines that the proposed federally owned storage project is feasible in accordance with the reclamation laws;

(B) secures an agreement providing upfront funding as is necessary to pay the non-Federal share of the capital costs; and

(C) determines that, in return for the Federal cost-share investment in the federally owned storage project, at least a proportionate share of the project benefits are Federal benefits, including water supplies dedicated to specific purposes such as environmental enhancement and wildlife refuges.

(4) ENVIRONMENTAL LAWS.—In participating in a federally owned storage project under this subsection, the Secretary of the Interior shall comply with all applicable environmental laws, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(b) State-led Storage Projects.—

(1) IN GENERAL.—Subject to the requirements of this subsection, the Secretary of the Interior may participate in a State-led storage project in an amount equal to not more than 25 percent of the total cost of the State-led storage project.

(2) REQUEST BY GOVERNOR.—Participation by the Secretary of the Interior in a State-led storage project under this subsection shall not occur unless—

(A) the participation has been requested by the Governor of the State in which the State-led storage project is located;

(B) the State or local sponsor determines, and the Secretary of the Interior concurs, that—

(i) the State-led storage project is technically and financially feasible;

(ii) sufficient non-Federal funding is available to complete the State-led storage project; and

(iii) the State-led storage project sponsors are financially solvent;

(C) the Secretary of the Interior determines that, in return for the Federal cost-share investment in the State-led storage project, at least a proportional share of the project benefits are the Federal benefits, including water supplies dedicated to specific purposes such as environmental enhancement and wildlife refuges; and

(D) the Secretary of the Interior submits to Congress a written

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1 notification of these determinations.

2 (3) ENVIRONMENTAL LAWS.—When participating in a State-led
3 storage project under this subsection, the Secretary shall comply with
4 all applicable environmental laws, including the National
5 Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

6 (4) INFORMATION.—When participating in a State-led storage
7 project under this subsection, the Secretary of the Interior—

8 (A) may rely on reports prepared by the sponsor of the State-
9 led storage project, including feasibility (or equivalent) studies,
10 environmental analyses, and other pertinent reports and
11 analyses; but

12 (B) shall retain responsibility for making the independent
13 determinations described in paragraph (2).

14 (c) Authority to Provide Assistance.—The Secretary of the Interior may
15 provide financial assistance under this subtitle to carry out projects within
16 any Reclamation State, including—

- 17 (1) Arizona;
- 18 (2) California;
- 19 (3) Colorado;
- 20 (4) Idaho;
- 21 (5) Kansas;
- 22 (6) Montana;
- 23 (7) Nebraska;
- 24 (8) Nevada;
- 25 (9) New Mexico;
- 26 (10) North Dakota;
- 27 (11) Oklahoma;
- 28 (12) Oregon;
- 29 (13) South Dakota;
- 30 (14) Texas;
- 31 (15) Utah;
- 32 (16) Washington; and
- 33 (17) Wyoming.

34 (d) Rights to Use Capacity.—Subject to compliance with State water
35 rights laws, the right to use the capacity of a federally owned storage
36 project or State-led storage project for which the Secretary of the Interior

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has entered into an agreement under this subsection shall be allocated in such manner as may be mutually agreed to by the Secretary of the Interior and each other party to the agreement.

(e) Compliance With California Water Bond.—

(1) IN GENERAL.—The provision of Federal funding for construction of a State-led storage project in the State of California shall be subject to the condition that the California Water Commission shall determine that the State-led storage project is consistent with the California Water Quality, Supply, and Infrastructure Improvement Act, approved by California voters on November 4, 2014.

(2) APPLICABILITY.—This subsection expires on the date on which State bond funds available under the Act referred to in paragraph (1) are fully expended.

(f) Partnership and Agreements.—The Secretary of the Interior, acting through the Commissioner, may partner or enter into an agreement regarding the water storage projects identified in section 103(d)(1) of the Water Supply, Reliability, and Environmental Improvement Act (Public Law 108–361; 118 Stat. 1688) with local joint powers authorities formed pursuant to State law by irrigation districts and other local water districts and local governments within the applicable hydrologic region, to advance those projects.

(g) Authorization of Appropriations.—

(1) IN GENERAL.—There is authorized to be appropriated to carry out this section \$600,000,000 to remain available until expended.

(2) ELIGIBILITY.—Only a federally owned storage project or State-led storage project that has been determined by the Secretary of the Interior to meet the eligibility criteria described in subsections (a) and (b) shall be eligible to receive funding under this section.

(h) Sunset.—This section shall apply only to federally owned storage projects and State-led storage projects that the Secretary of the Interior determines to be feasible before January 1, 2021.

SEC. 113. RESERVOIR OPERATION IMPROVEMENT.

(a) Report.—Not later than 180 days after the date of enactment of this Act, the Secretary of the Army shall submit to the Committees on Appropriations and Environment and Public Works of the Senate and the Committees on Appropriations and Transportation and Infrastructure of the House of Representatives a report describing, with respect to any State under a gubernatorial drought declaration during water year 2015 or 2016, the following:

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1 (1) A list of Corps of Engineer projects and non-Federal projects
2 operated for flood control in accordance with rules prescribed by the
3 Secretary of the Army pursuant to section 7 of the Act of December
4 22, 1944 (commonly known as the “Flood Control Act of 1944”) (58
5 Stat. 890, chapter 665)).

6 (2) The year during which the original water control manual was
7 approved.

8 (3) The year during which any subsequent revisions to the water
9 control plan and manual of the project are proposed to occur.

10 (4) A list of projects for which operational deviations for drought
11 contingency have been requested, and the status of the request.

12 (5) The means by which water conservation and water quality
13 improvements were addressed.

14 (6) A list of projects for which permanent or seasonal changes to
15 storage allocations have been requested, and the status of the request.

16 (b) Project Identification.—Not later than 60 days after the date of
17 completion of the report under subsection (a), the Secretary of the Army
18 shall identify any projects described in the report that meet the following
19 criteria:

20 (1) The project is located in a State in which a drought emergency
21 has been declared or was in effect during the 1-year period preceding
22 the date of final review by the Secretary.

23 (2) The water control manual and hydrometeorological information
24 establishing the flood control rule curves of the project are considered
25 out of date as a result of not being updated for a period of 20 years.

26 (3) A non-Federal sponsor of a Corps of Engineers project, or
27 owner of a non-Federal project, as applicable, has submitted to the
28 Secretary a written request to revise water operations manuals,
29 including flood control rule curves, based on the use of improved
30 weather forecasting or run-off forecasting methods, new watershed
31 data, changes to project operations, or structural improvements.

32 (c) Pilot Projects.—

33 (1) IN GENERAL.—Not later than 1 year after the date of
34 identification of projects under subsection (b), if any, the Secretary of
35 the Army shall carry out not more than 15 pilot projects, including
36 not less than 6 non-Federal projects (within the meaning of
37 subsection (a)(1)), if any are identified under subsection (b), to
38 implement revisions of water operations manuals, including flood
39 control rule curves, based on the best available science, which may
40 include—

41 (A) forecast-informed operations;

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1 (B) new watershed data; and

2 (C) if applicable, in the case of non-Federal projects,
3 structural improvements.

4 (2) CONSULTATION.—In implementing the pilot projects pursuant
5 to this subsection, the Secretary of the Army shall consult with all
6 affected interests, including—

7 (A) non-Federal entities responsible for operations and
8 maintenance costs of a Corps of Engineers facility;

9 (B) affected water rights holders;

10 (C) individuals and entities with storage entitlements; and

11 (D) local agencies with flood control responsibilities
12 downstream of a Corps of Engineers facility.

13 (d) Coordination With Non-federal Project Entities.—Before carrying
14 out an activity under this section, if a project identified under subsection
15 (b) is—

16 (1) a non-Federal project, the Secretary of the Army shall—

17 (A) consult with the non-Federal project owner; and

18 (B) enter into a cooperative agreement, memorandum of
19 understanding, or other agreement with the non-Federal project
20 owner describing the scope and goals of the activity and the
21 coordination among the parties; or

22 (2) owned and operated by the Corps of Engineers, the Secretary of
23 the Army shall—

24 (A) consult with each non-Federal entity (including a
25 municipal water district, irrigation district, joint powers
26 authority, or other local governmental entity) that currently—

27 (i) manages (in whole or in part) a Corps of Engineers
28 dam or reservoir; or

29 (ii) is responsible for operations and maintenance costs;
30 and

31 (B) enter into a cooperative agreement, memorandum of
32 understanding, or other agreement with each the entity
33 describing the scope and goals of the activity and the
34 coordination among the parties.

35 (e) Consideration.—In designing and implementing a forecast-informed
36 reservoir operations plan, the Secretary of the Army shall work closely
37 with the National Oceanic and Atmospheric Administration and may
38 consider—

39 (1) the relationship between ocean and atmospheric conditions,

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including the El Nino and La Nina cycles, and the potential for above-normal, normal, and below-normal rainfall for the coming water year, including consideration of atmospheric river forecasts;

(2) the precipitation and runoff index specific to the basin and watershed of the relevant dam or reservoir, including incorporating knowledge of hydrological and meteorological conditions that influence the timing and quantity of runoff;

(3) improved hydrologic forecasting for precipitation, snowpack, and soil moisture conditions;

(4) an adjustment of operational flood control rule curves to optimize water supply storage and reliability, hydropower production, environmental benefits for flows and temperature, and other authorized project benefits, without a reduction in flood safety; and

(5) proactive management in response to changes in forecasts.

(f) Funding.—

(1) DEFINITION OF OPERATIONAL DOCUMENT.—In this subsection, the term “operational document” means—

(A) a water control plan;

(B) a water control manual;

(C) a water control diagram;

(D) a release schedule;

(E) a rule curve;

(F) an operational agreement with a non-Federal entity; and

(G) any environmental documentation associated with a document described in any of subparagraphs (A) through (F).

(2) ACCEPTANCE AND USE.—The Secretary of the Army may accept and expend amounts from non-Federal entities to fund all or a portion of the cost of carrying out a review or revision of operational documents for any reservoir that is either operated or maintained by the Secretary, or for which the Secretary is authorized to prescribe regulations or otherwise advise or consult concerning the use of storage allocated for flood risk management or navigation.

(g) Effect of Manual Revisions and Other Provisions.—

(1) MANUAL REVISIONS.—In accordance with all applicable laws, a revision of a manual shall not interfere with—

(A) the authorized purposes of a Corps of Engineers project;

or

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(B) the existing purposes of a non-Federal project that is regulated for flood control by the Secretary of the Army.

(2) EFFECT.—

(A) ACT.—Nothing in this Act authorizes the Secretary of the Army to carry out, at a Corps of Engineers or non-Federal dam or reservoir, any project or activity for a purpose not otherwise authorized as of the date of enactment of this Act.

(B) SECTION.—Nothing in this section—

(i) affects or modifies any obligation of the Secretary of the Army under State law; or

(ii) authorizes the diversion or use of water in a manner that is inconsistent with State water rights law.

(3) BUREAU OF RECLAMATION PROJECTS EXCLUDED.—This section shall not apply to any dam or reservoir owned by the Bureau of Reclamation.

(h) Modifications to Manuals and Curves.—Not later than 180 days after the date of completion of a modification to an operations manual or flood control rule curve, the Secretary of the Army shall submit to Congress a report regarding the components of the forecast-based reservoir operations plan incorporated into the change.

SEC. 114. FINDINGS.

Congress finds that—

(1) the record drought conditions being experienced in the State of California as of the date of enactment of this Act are—

(A) expected to recur in the future; and

(B) likely to do so with increasing frequency;

(2) water storage is an indispensable and integral part of any solution to address the long-term water challenges of the State of California;

(3) Congress has authorized relevant feasibility studies for 5 water storage projects in the State of California, including projects for—

(A) enlargement of Shasta Dam in Shasta County under section 2(a) of Public Law 96–375 (94 Stat. 1506), as reaffirmed under section 103(d)(1)(A)(i)(I) of Public Law 108–361 (118 Stat. 1684);

(B) enlargement of Los Vaqueros Reservoir in Contra Costa County under section 215 of Public Law 108–7 (117 Stat. 147), as reaffirmed under section 103(d)(1)(A)(i)(II) of Public Law 108–361 (118 Stat. 1684);

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(C) construction of North-of-Delta Offstream Storage (Sites Reservoir) in Colusa County under section 215 of Public Law 108–7 (117 Stat. 147), as reaffirmed under section 103(d)(1)(A)(ii)(I) of Public Law 108–361 (118 Stat. 1684);

(D) construction of the Upper San Joaquin River storage (Temperance Flat) in Fresno and Madera Counties under section 215 of Public Law 108–7 (117 Stat. 147), as reaffirmed under section 103(d)(1)(A)(ii)(II) of Public Law 108–361 (118 Stat. 1684); and

(E) expansion of San Luis Reservoir under section 103(f)(1)(A) of Public Law 108–361 (118 Stat. 1694);

(4) as of the date of enactment of this Act, more than 10 years have elapsed since the authorization of the feasibility studies referred to in paragraph (3), but for a variety of reasons the slow pace of work on completion of the feasibility studies for those 5 water storage projects is unjustified and of deep concern; and

(5) there is significant public interest in, and urgency with respect to, completing all feasibility studies and environmental reviews for the water storage projects referred to in paragraph (3), given the critical need for that infrastructure to address current and future water challenges of the State of California.

SEC. 115. STUDIES.

The Secretary of the Interior, through the Commissioner, shall—

(1) complete the Upper San Joaquin River (Temperance Flat) feasibility study described in clause (ii)(II) of section 103(d)(1)(A) of Public Law 108–361 (118 Stat. 1684) and submit the study to the appropriate committees of the House of Representatives and the Senate not later than March 31, 2016;

(2) complete the Los Vaqueros Reservoir feasibility study described in clause (i)(II) of section 103(d)(1)(A) of Public Law 108–361 (118 Stat. 1684) and submit the study to the appropriate committees of the House of Representatives and the Senate not later than November 30, 2016;

(3) complete a publicly available draft of the North-of-Delta Offstream Storage (Sites Reservoir) feasibility study described in clause (ii)(I) of section 103(d)(1)(A) of Public Law 108–361 (118 Stat. 1684) and submit the study to the appropriate committees of the House of Representatives and the Senate not later than November 30, 2016;

(4) complete the North-of-Delta Offstream Storage (Sites Reservoir) feasibility study described in clause (ii)(I) of section

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103(d)(1)(A) of Public Law 108–361 (118 Stat. 1684) and submit the study to the appropriate committees of the House of Representatives and the Senate not later than November 30, 2017;

(5) complete the San Luis Reservoir feasibility study described in section 103(f)(1)(A) of Public Law 108–361 (118 Stat. 1694) and submit the study to the appropriate Committees of the House of Representatives and the Senate not later than December 31, 2017;

(6) provide a progress report on the status of the feasibility studies referred to in paragraphs (1) through (3) to the appropriate committees of the House of Representatives and the Senate not later than 90 days after the date of enactment of this Act and every 180 days thereafter until December 31, 2017, as applicable, which report shall include timelines for study completion, draft environmental impact statements, final environmental impact statements, and records of decision;

(7) document, delineate, and publish costs directly relating to the engineering and construction of a water storage project separately from the costs resulting from regulatory compliance or the construction of auxiliary facilities necessary to achieve regulatory compliance if the Secretary of the Interior determines in any feasibility study required under this subsection, reclamation laws, the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4706), the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other applicable law, that the project is not feasible;

(8) include information required in paragraph (7) in the feasibility studies issued pursuant paragraphs (1) through (5), as applicable; and

(9) communicate, coordinate, and cooperate with public water agencies that—

(A) contract with the United States for Central Valley Project water; and

(B) are expected to participate in the cost pools that will be created for the projects proposed in the feasibility studies under this section.

SEC. 116. LOSSES CAUSED BY CONSTRUCTION AND OPERATION OF WATER STORAGE PROJECTS.

The Secretary of the Interior, in consultation with other appropriate agencies, shall establish a process to address direct and substantial impacts caused by any storage projects identified under section 115.

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Subtitle C—Desalination, Water Reuse and Recycling, and Conservation

SEC. 121. WATER RECYCLING AND DESALINATION PROJECTS.

(a) Findings.—Congress finds that—

(1) Federal funding to support water recycling and desalination projects in recent years has been insufficient to address water supply needs in many regions across the United States;

(2) climate variability and drought resiliency require additional water supply projects to cope with higher probabilities of longer, more intense droughts;

(3) the historic drought in the State of California highlights the necessity of long-term projects to address a changing climate;

(4) surveys conducted by the by the National Association of Clean Water Agencies, the Water Reuse Association, the Association of California Water Agencies, and the California Association of Sanitation Agencies have identified 131 water recycling projects in 14 States capable of producing 1,180,000 acre-feet of new municipal water supplies if sufficient funding or financing tools existed to facilitate development of the projects;

(5) there exists a Federal interest in the projects referred to in paragraph (4) to the extent that the projects can—

(A) diversify water supplies;

(B) reduce conflicts hindering existing Federal reclamation efforts on the Colorado River and around the Delta; and

(C) advance technologies which reduce the cost and improve the efficiency of water desalination projects; and

(6) this Act will enable Federal support for desalination projects, including the projects referred to in paragraph (4) and others by providing Federal cost-share grants, through the Water Desalination Act of 1996 (42 U.S.C. 10301 note; Public Law 104–298), the Reclamation Wastewater and Groundwater Study and Facilities Act (43 U.S.C. 390h et seq.), and the WaterSMART program of the Department of the Interior, and by making low-cost loans or loan guarantees available under subtitle D.

(b) Water Recycling Projects.—On submission of a completed feasibility report in accordance with Bureau of Reclamation standards, the Secretary of the Interior shall review requests for water recycling project funding assistance and, subject to the availability of appropriations, award

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1 funding, on a competitive basis, for projects that meet the eligibility
2 requirements of this title, subject to the condition that the Secretary shall
3 include among the projects reviewed water recycling projects sponsored
4 by any of the following:

- 5 (1) Bear Valley Community Services District.
- 6 (2) Beaumont Cherry Valley Water District.
- 7 (3) Burbank Water and Power.
- 8 (4) Cambria Community Services District.
- 9 (5) Central Contra Costa Sanitary District.
- 10 (6) City of American Canyon.
- 11 (7) City of Benicia.
- 12 (8) City of Brentwood.
- 13 (9) City of Camarillo.
- 14 (10) City of Carlsbad (Municipal Water District).
- 15 (11) City of Corona Department of Water and Power.
- 16 (12) City of Daly City.
- 17 (13) City of Del Mar.
- 18 (14) City of Escondido.
- 19 (15) City of Fresno.
- 20 (16) City of Hayward.
- 21 (17) City of Los Angeles (Bureau of Sanitation and Department of
22 Water and Power).
- 23 (18) City of Modesto.
- 24 (19) City of Morro Bay.
- 25 (20) City of Mountain View.
- 26 (21) City of Oceanside.
- 27 (22) City of Palo Alto.
- 28 (23) City of Paso Robles.
- 29 (24) City of Pismo Beach.
- 30 (25) City of Pleasanton.
- 31 (26) City of Poway.
- 32 (27) City of Redwood City.
- 33 (28) City of Riverside.

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- 1 (29) City of Roseville.
- 2 (30) City of Sacramento.
- 3 (31) City of San Bernardino.
- 4 (32) City of San Diego.
- 5 (33) City of San Luis Obispo.
- 6 (34) City of Santa Barbara.
- 7 (35) City of Santa Rosa.
- 8 (36) City of Shasta Lake.
- 9 (37) City of Sunnyvale.
- 10 (38) City of Turlock.
- 11 (39) City of Vacaville.
- 12 (40) City of Visalia.
- 13 (41) Clear Creek Community Services District.
- 14 (42) Coachella Valley Water District.
- 15 (43) Cucamonga Valley Water District.
- 16 (44) Delta Diablo Sanitation District.
- 17 (45) Desert Water Agency.
- 18 (46) Dublin San Ramon Services District.
- 19 (47) East Bay Municipal Utility District.
- 20 (48) East Valley Water District.
- 21 (49) Eastern Municipal Water District.
- 22 (50) El Dorado Irrigation District.
- 23 (51) Fallbrook Public Utility District.
- 24 (52) Goleta Water District.
- 25 (53) Helendale Community Services District.
- 26 (54) Hi-Desert Water District.
- 27 (55) Idyllwild Water District.
- 28 (56) Inland Empire Utilities Agency.
- 29 (57) Ironhouse Sanitary District.
- 30 (58) Irvine Ranch Water District.
- 31 (59) Las Virgenes Municipal Water District.
- 32 (60) Leucadia Wastewater District.

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- 1 (61) Los Carneros Water District.
- 2 (62) Marin Municipal Water District.
- 3 (63) Monterey Regional Water Pollution Control Agency.
- 4 (64) Napa County Department of Public Works.
- 5 (65) North Bay Water Reuse Authority.
- 6 (66) North Marin Water District.
- 7 (67) Novato Sanitary District.
- 8 (68) Olivenhain Municipal Water District.
- 9 (69) Orange County Sanitation District.
- 10 (70) Orange County Water District.
- 11 (71) Otay Water District.
- 12 (72) Padre Dam Municipal Water District.
- 13 (73) Pajaro Valley Water Management Agency.
- 14 (74) Paradise Irrigation District.
- 15 (75) Pebble Beach Community Services District.
- 16 (76) Rainbow Municipal Water District.
- 17 (77) Ramona Municipal Water District.
- 18 (78) Rancho California Water District.
- 19 (79) Rincon Del Diablo Municipal Water District.
- 20 (80) Sacramento Regional County Sanitation District.
- 21 (81) San Bernardino County Special Districts.
- 22 (82) San Francisco Public Utilities Commission.
- 23 (83) San Jose Water Company.
- 24 (84) San Luis Obispo County.
- 25 (85) Santa Clara Valley Water District.
- 26 (86) Santa Clarita Valley Sanitation District.
- 27 (87) Santa Fe Irrigation District.
- 28 (88) Santa Margarita Water District.
- 29 (89) Sonoma County Water Agency.
- 30 (90) South Orange County Wastewater Authority.
- 31 (91) South Tahoe Public Utility District.
- 32 (92) Sunnyslope County Water District.

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- 1 (93) Town of Yountville.
- 2 (94) Tuolumne Utilities District.
- 3 (95) Upper San Gabriel Valley Municipal Water District.
- 4 (96) Valley Center Municipal Water District.
- 5 (97) Valley Sanitary District.
- 6 (98) Ventura County Waterworks District No. 8.
- 7 (99) Victor Valley Wastewater Reclamation Authority.
- 8 (100) West Basin Municipal Water District.
- 9 (101) West Bay Sanitary District.
- 10 (102) West County Wastewater District.
- 11 (103) Western Municipal Water District of Riverside County.
- 12 (104) Western Riverside County Regional Wastewater Authority.
- 13 (105) Yucaipa Valley Water District.

14 (c) Federal Support for Water Recycling Projects.—Water recycling
15 and reuse projects described in subsection (b) may compete for funding
16 authorized under the following sections of this title if the projects meet
17 applicable eligibility requirements, subject to the condition that no
18 particular project receive Federal grant funding from more than one
19 Federal program:

20 (1) Section 101, which amends section 9504 (WaterSMART) of
21 the Omnibus Public Land Management Act of 2009 (42 U.S.C.
22 10364) and authorizes \$150,000,000 in additional Federal assistance
23 for water storage and conveyance facilities, integrated regional water
24 management, reclamation and recycling projects, and groundwater
25 recharge.

26 (2) Section 123, which amends the Reclamation Wastewater and
27 Groundwater Study and Facilities Act (43 U.S.C. 390h) and
28 authorizes \$200,000,000 in Federal assistance for water recycling and
29 reuse projects.

30 (3) Subtitle D, which authorizes the Secretary of the Interior to
31 provide Federal assistance to finance the development of critical
32 water resource infrastructure through loans and loan guarantees to
33 qualified applicants.

34 (d) Federal Support for Desalination Projects.—

35 (1) ELIGIBILITY.—On submission of a completed feasibility report
36 in accordance with Bureau of Reclamation standards, the Secretary of
37 the Interior shall review requests for water desalination funding
38 assistance and, subject to the availability of appropriations, award

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1 funding on a competitive basis for projects that meet the eligibility
2 requirements of this title, subject to the condition that the Secretary
3 shall include among the projects reviewed the following desalination
4 projects referred to in the 2013 California Water Plan or in an
5 integrated regional water management plan accepted by the State of
6 California:

7 (A) Cambria Desalination Project.

8 (B) Camp Pendleton Seawater Desalination Project.

9 (C) Chino Basin Desalter 3.

10 (D) Doheny Ocean Desalination Project.

11 (E) GREAT Program Groundwater Desalination Facility
12 Expansion.

13 (F) Huntington Beach Seawater Desalination Project.

14 (G) Irvine Non-Potable Shallow Groundwater Unit Desalter.

15 (H) Irvine Ranch Water District Wells 51, 52, 53, 21, and 22
16 Potable (Non-exempt) Desalter Plant.

17 (I) Long Beach Seawater Desalination Project.

18 (J) Marina Desalination Facility Expansion.

19 (K) Mission Valley Brackish Groundwater Recovery Project.

20 (L) Monterey Bay Regional Water Project Desalination
21 Facility (Moss Landing).

22 (M) Monterey Peninsula Water Supply Project.

23 (N) Monterey Peninsula Water Supply Project (Ocean
24 Desalination/Groundwater Replenishment).

25 (O) Moorpark Groundwater Desalter.

26 (P) North Pleasant Valley Groundwater Desalter.

27 (Q) Oceanside Ocean Desalination Project (San Luis Rey
28 Basin).

29 (R) Perris II Desalter.

30 (S) Ramona Desalting Facility.

31 (T) San Diego Formation/Balboa Park Groundwater
32 Desalination Facility.

33 (U) San Elijo Valley Groundwater Project.

34 (V) San Pasqual Brackish Groundwater Recovery Project.

35 (W) Santa Cruz/Soquel Creek Water District Desalination
36 Plant.

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(X) South Orange Coastal Ocean Desalination Project.

(Y) West Basin Seawater Desalination Regional Project.

(Z) West Simi Valley Desalter.

(AA) Bay Area Regional Desalination Project.

(2) FUNDING.—Desalination projects described in subsection (1) may compete for funding authorized under the following sections of this Title if the projects meet applicable eligibility requirements, subject to the condition that no particular project receive Federal grant funding from more than one Federal program:

(A) Section 101, which amends section 9504 (WaterSMART) of the Omnibus Public Land Management Act of 2009 (42 U.S.C. 10364) and authorizes \$150,000,000 in additional Federal assistance for water storage and conveyance facilities, integrated regional water management, reclamation and recycling projects, and groundwater recharge.

(B) Section 122, which reauthorizes the Water Desalination Act of 1996 (42 U.S.C. 10301; Public Law 104-298) as amended, and authorizes \$100,000,000 in Federal assistance for desalination research, demonstration projects, and desalination project feasibility and design.

(C) Section 123, which amends the Reclamation Wastewater and Groundwater Study and Facilities Act (43 U.S.C. 390h) and authorizes \$200,000,000 in Federal assistance for water recycling and reuse projects.

(D) Subtitle D, which authorizes the Secretary of the Interior to provide Federal assistance to finance the development of critical water resource infrastructure through loans and loan guarantees to qualified applicants.

SEC. 122. REAUTHORIZATION OF WATER DESALINATION ACT.

(a) Authorization of Research and Studies.—

(1) IN GENERAL.—Section 3 of the Water Desalination Act of 1996 (42 U.S.C. 10301 note; Public Law 104-298) is amended by adding at the end the following:

“(e) Prioritization.—In carrying out this section, the Secretary of the Interior shall prioritize funding for research—

“(1) to reduce energy consumption and lower the cost of seawater and brackish water desalination;

“(2) to reduce the environmental impacts of seawater desalination,

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- 1 including subsurface intakes and other technological improvements,
2 and develop technology and strategies to mitigate those impacts;
- 3 “(3) to improve existing reverse osmosis and membrane
4 technology;
- 5 “(4) to carry out basic and applied research on next generation
6 desalination technologies, including graphene membranes, forward
7 osmosis, hybrid membrane-thermal desalination, improved energy
8 recovery systems, and renewable energy-powered desalination
9 systems that could significantly reduce desalination costs;
- 10 “(5) to develop portable or modular desalination units capable of
11 providing temporary emergency water supplies for domestic or
12 military deployment purposes; and
- 13 “(6) to encourage development of desalination siting plans,
14 including maps of preferred and priority locations, by States that
15 consider local and regional water supply needs and sources, potential
16 impacts on coastal and ocean resources and fisheries, the effects of
17 sea level rise and other factors that affect project siting.”.
- 18 (b) Desalination Demonstration and Development.—Section 4 of the
19 Water Desalination Act of 1996 (42 U.S.C. 10301 note; Public Law 104–
20 298) is amended—
- 21 (1) in subsection (a)—
- 22 (A) by redesignating paragraphs (2) and (3) as paragraphs (3)
23 and (4), respectively; and
- 24 (B) by inserting after paragraph (1) the following:
- 25 “(2) FEASIBILITY AND DESIGN.—Award grants and enter into
26 contracts with non-Federal project sponsors to provide financial
27 assistance to study the feasibility and support the design of
28 desalination facilities (including associated water distribution
29 infrastructure) that provide usable water.”; and
- 30 (2) by adding at the end the following:
- 31 “(c) Prioritization.—In carrying out demonstration and development
32 activities under subsection (a), the Secretary of the Interior shall prioritize
33 projects—
- 34 “(1) in drought-stricken States and communities;
- 35 “(2) in States for which funding has been authorized for
36 desalination demonstration and development projects; and
- 37 “(3) that can reduce reliance on imported water supplies that have
38 an impact on species listed under the Endangered Species Act of
39 1973 (16 U.S.C. 1531 et seq.).
- 40 “(d) Criteria for Eligibility.—In carrying out this section, the Secretary

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of the Interior shall establish criteria to determine projects eligible for grant funding based on the ability of the projects to provide regional water supply benefits, including—

“(1) improving water supply reliability in regions subject to frequent and severe drought;

“(2) enhancement of public health, safety, ecosystems, and watershed sustainability;

“(3) preservation of groundwater through reduction of withdrawals from aquifers;

“(4) offsetting demand for water conveyed from environmentally sensitive areas outside service area of the project; and

“(5) mitigation of saltwater intrusion to aquifers.”.

(c) Cost Sharing.—Section 7 of the Water Desalination Act of 1996 (42 U.S.C. 10301 note; Public Law 104–298) is amended—

(1) in the first sentence, by striking “The Federal share” and inserting the following:

“(a) Maximum.—

“(1) IN GENERAL.—Except as provided in paragraph (2) and subsection (b) and limited to the 5 years following the date of enactment of the California Emergency Drought Relief Act, the Federal share”;

(2) in the second sentence, by striking “A Federal” and inserting the following:

“(b) Feasibility Determination.—A Federal”;

(3) in the third sentence, by striking “The Secretary” and inserting the following:

“(c) Procedures.—The Secretary”;

(4) in the fourth sentence, by striking “Costs” and inserting the following:

“(d) Operation, Maintenance, Repair, and Rehabilitation.—The costs”;
and

(5) in subsection (a) (as designated by paragraph (1)), by adding at the end the following:

“(2) EXCEPTION.—The Federal share of the cost of project design under section 4 shall not exceed 25 percent of the total cost of the project design.”.

(d) Authorization of Appropriations.—In order to advance water desalination research and project development, Section 8 of the Water

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Desalination Act of 1996 (42 U.S.C. 10301 note; Public Law 104–298) is amended—

(1) in subsection (a), in the first sentence—

(A) by striking “\$5,000,000” and inserting “\$10,000,000”;
and

(B) by striking “2013” and inserting “2020”; and

(2) in subsection (b), by striking “\$3,000,000 for each of fiscal years 2012 through 2013” and inserting “\$50,000,000 for the period of fiscal years 2016 through 2020”.

(e) Consultation.—Section 9 of the Water Desalination Act of 1996 (42 U.S.C. 10301 note; Public Law 104–298) is amended—

(1) by striking the section designation and heading and all that follows through “In carrying out the provisions of” in the first sentence and inserting the following:

“SEC. 9. CONSULTATION AND COORDINATION.

“(a) Consultation.—In carrying out”;

(2) in the second sentence, by striking “The authorization” and inserting the following:

“(b) Other Desalination Programs.—The authorization”; and

(3) by inserting after subsection (b) (as so designated) the following:

“(c) Coordination of Federal Desalination Research and Development.—For the effective period of the California Emergency Drought Relief Act, the White House Office of Science and Technology Policy shall develop a coordinated strategic plan that—

“(1) establishes priorities for future Federal investments in desalination; and

“(2) coordinates the activities of Federal agencies involved in desalination, including the Bureau of Reclamation, the National Science Foundation, the Office of Naval Research of the Department of Defense, the National Laboratories of the Department of Energy, the United States Geological Survey, the Environmental Protection Agency, and the National Oceanic and Atmospheric Administration.”.

SEC. 123. NEW WATER RECYCLING AND REUSE PROJECTS.

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Section 1602 of the Reclamation Wastewater and Groundwater Study and Facilities Act (43 U.S.C. 390h) is amended by adding at the end the following:

“(e) Authorization of New Water Recycling and Reuse Projects.—

“(1) IN GENERAL.—A non-Federal interest may submit to the Secretary of the Interior proposals for eligible projects in the form of completed feasibility studies.

“(2) AUTHORITY TO PROVIDE ASSISTANCE.—The Secretary of the Interior may provide financial assistance under this subtitle to carry out projects within—

“(A) any Reclamation State, including—

“(i) Arizona;

“(ii) California;

“(iii) Colorado;

“(iv) Idaho;

“(v) Kansas;

“(vi) Montana;

“(vii) Nebraska;

“(viii) Nevada;

“(ix) New Mexico;

“(x) North Dakota;

“(xi) Oklahoma;

“(xii) Oregon;

“(xiii) South Dakota;

“(xiv) Texas;

“(xv) Utah;

“(xvi) Washington; and

“(xvii) Wyoming; and

“(B) the States of Alaska and Hawaii.

“(3) ELIGIBLE PROJECTS.—A project shall be considered to be eligible for consideration under this subsection if the project reclaims and reuses—

“(A) municipal, industrial, domestic, or agricultural wastewater; or

“(B) impaired groundwater or surface water.

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1 “(4) REVIEW.—The Secretary of the Interior shall review each
2 feasibility study received under paragraph (1) to determine whether
3 the study, and the process under which the study was developed,
4 comply with Federal laws (including regulations) applicable to
5 feasibility studies of water recycling and reuse projects.

6 “(f) Competitive Grant Funding of Water Recycling and Reuse
7 Projects.—

8 “(1) IN GENERAL.—The Secretary of the Interior shall administer a
9 competitive grant program under which the non-Federal project
10 sponsor of any project determined by the Secretary of the Interior to
11 be feasible under subsection (e)(4) shall be eligible to apply for
12 funding for the planning, design, and construction of the project.

13 “(2) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to
14 be appropriated to the Secretary of the Interior to carry out this
15 subsection \$200,000,000, to remain available until expended.”.

21 SEC. 124. PROMOTING WATER 22 EFFICIENCY WITH WATERSENSE.

23 (a) Authorization.—The Administrator of the Environmental Protection
24 Agency (referred to in this section as the “Administrator”) is authorized to
25 continue to carry out the voluntary program, known as the “WaterSense
26 Program”, to identify and promote water efficient products, buildings,
27 landscapes, facilities, processes, and services so as—

28 (1) to reduce water use;

29 (2) to reduce the strain on water, wastewater, and stormwater
30 infrastructure;

31 (3) to conserve energy used to pump, heat, transport, and treat
32 water; and

33 (4) to preserve water resources for future generations, through
34 voluntary labeling of, or other forms of communications regarding,
35 products, buildings, landscapes, facilities, processes, and services that
36 meet the highest water efficiency and performance criteria.

37 (b) Review.—Not less frequently than once every 4 years, the
38 Administrator shall regularly review and, if appropriate, update
39 WaterSense criteria that have been adopted for the voluntary labeling of
40 categories of products, buildings, landscapes, facilities, processes, and
41 services.

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(c) Transparency.—The Administrator shall, to the maximum extent practicable, regularly estimate and make available to the public the production and relative market shares of, and the savings of water, energy, and capital costs of water, wastewater, and stormwater infrastructure attributable to the use of WaterSense-labeled products, buildings, landscapes, facilities, processes, and services, at least annually.

(d) Public Comment.—Prior to establishing or revising a WaterSense category, specification, installation criterion, or other criterion, the Administrator shall—

(1) solicit comments from interested parties and the public; and

(2) provide reasonable notice to interested parties and the public of any changes (including effective dates), on the adoption of a new or revised category, specification, installation criterion, or other criterion.

(e) Authorization of Appropriations.—There is authorized to be appropriated to carry out the WaterSense program of the Environmental Protection Agency \$2,500,000 for each of fiscal years 2016 through 2019.

Subtitle D—Reclamation Infrastructure Finance and Innovation

SEC. 131. PURPOSES.

The purposes of this subtitle are—

(1) to promote increased development of critical water resources infrastructure by establishing additional opportunities for financing water resources projects;

(2) to attract new investment capital to infrastructure projects that are capable of generating revenue streams through user fees or other dedicated funding sources;

(3) to complement existing Federal funding sources and address budgetary constraints on Bureau of Reclamation programs; and

(4) to leverage private investment in water resources infrastructure.

SEC. 132. DEFINITIONS.

In this subtitle:

(1) ELIGIBLE ENTITY.—The term “eligible entity” means—

(A) a corporation;

(B) a partnership;

(C) a joint venture;

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1 (D) a trust;

2 (E) a State, or local governmental entity, agency, or
3 instrumentality; and

4 (F) a conservancy district, irrigation district, canal company,
5 mutual water company, water users' association, Indian tribe,
6 agency created by interstate compact, or any other entity that has
7 the capacity to contract with the United States under the
8 reclamation laws.

9 (2) FEDERAL CREDIT INSTRUMENT.—The term “Federal credit
10 instrument” means a secured loan or loan guarantee authorized to be
11 made available under this title with respect to a project.

12 (3) INVESTMENT-GRADE RATING.—The term “investment-grade
13 rating” means a rating of BBB minus, Baa3, bbb minus, BBB (low),
14 or higher as assigned by a rating agency to project obligations.

15 (4) LENDER.—

16 (A) IN GENERAL.—The term “lender” means any non-Federal
17 qualified institutional buyer (as defined in section 230.144A(a)
18 of title 17, Code of Federal Regulations (or a successor
19 regulation) (commonly known as “Rule 144A(a) of the
20 Securities and Exchange Commission” and issued under the
21 Securities Act of 1933 (15 U.S.C. 77a et seq.))).

22 (B) INCLUSIONS.—The term “lender” includes—

23 (i) a qualified retirement plan (as defined in section 4974
24 of the Internal Revenue Code of 1986) that is a qualified
25 institutional buyer; and

26 (ii) a governmental plan (as defined in section 414 of the
27 Internal Revenue Code of 1986) that is a qualified
28 institutional buyer.

29 (5) LOAN GUARANTEE.—The term “loan guarantee” means any
30 guarantee or other pledge by the Secretary of the Interior to pay all or
31 part of the principal of, and interest on, a loan or other debt obligation
32 issued by an obligor and funded by a lender.

33 (6) OBLIGOR.—The term “obligor” means an eligible entity that is
34 primarily liable for payment of the principal of, or interest on, a
35 Federal credit instrument.

36 (7) PROJECT OBLIGATION.—

37 (A) IN GENERAL.—The term “project obligation” means any
38 note, bond, debenture, or other debt obligation issued by an
39 obligor in connection with the financing of a project.

40 (B) EXCLUSION.—The term “project obligation” does not

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1 include a Federal credit instrument.

2 (8) RATING AGENCY.—The term “rating agency” means a credit
3 rating agency registered with the Securities and Exchange
4 Commission as a nationally recognized statistical rating organization
5 (as defined in section 3(a) of the Securities Exchange Act of 1934 (15
6 U.S.C. 78c(a)).

7 (9) RECLAMATION STATE.—The term “Reclamation State” means
8 any of the States of—

- 9 (A) Arizona;
- 10 (B) California;
- 11 (C) Colorado;
- 12 (D) Idaho;
- 13 (E) Kansas;
- 14 (F) Montana;
- 15 (G) Nebraska;
- 16 (H) Nevada;
- 17 (I) New Mexico;
- 18 (J) North Dakota;
- 19 (K) Oklahoma;
- 20 (L) Oregon;
- 21 (M) South Dakota;
- 22 (N) Texas;
- 23 (O) Utah;
- 24 (P) Washington; and
- 25 (Q) Wyoming.

26 (10) SECURED LOAN.—The term “secured loan” means a direct
27 loan or other debt obligation issued by an obligor and funded by the
28 Secretary in connection with the financing of a project under subtitle
29 A.

30 (11) SUBSIDY AMOUNT.—The term “subsidy amount” means the
31 amount of budget authority sufficient to cover the estimated long-
32 term cost to the Federal Government of a Federal credit instrument,
33 as calculated on a net present value basis, excluding administrative
34 costs and any incidental effects on Governmental receipts or outlays
35 in accordance with the Federal Credit Reform Act of 1990 (2 U.S.C.
36 661 et seq.).

37 (12) SUBSTANTIAL COMPLETION.—The term “substantial

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completion”, with respect to a project, means the earliest date on which a project is considered to perform the functions for which the project is designed.

SEC. 133. AUTHORITY TO PROVIDE ASSISTANCE.

The Secretary of the Interior may provide financial assistance under this subtitle to carry out projects within—

(1) any Reclamation State;

(2) any other State in which the Bureau of Reclamation is authorized to provide project assistance; and

(3) the States of Alaska and Hawaii.

SEC. 134. APPLICATIONS.

To be eligible to receive assistance under this subtitle, an eligible entity shall submit to the Secretary of the Interior an application at such time, in such manner, and containing such information as the Secretary of the Interior may require.

SEC. 135. ELIGIBILITY FOR ASSISTANCE.

(a) Eligible Projects.—The following non-federally owned projects that contribute to a safe, adequate water supply for domestic, agricultural, environmental, or municipal and industrial use may be carried out using assistance made available under this subtitle:

(1) A project for the reclamation and reuse of wastewater, and naturally impaired ground and surface waters, which has a completed feasibility study that complies with Reclamation standards.

(2) A new water infrastructure facility project, including a water conduit, pipeline, canal, pumping, power, and associated facilities.

(3) A project for accelerated repair and replacement of an aging water distribution facility.

(4) A brackish or sea water desalination project.

(5) A project for groundwater replenishment, groundwater storage, or surface storage.

(6) A combination of projects, each of which is eligible under paragraphs (1) through (5), for which an eligible entity or group of eligible entities submits a single application.

(b) Activities Eligible for Assistance.—For purposes of this subtitle, an eligible activity with respect to an eligible project under subsection (a) includes the cost of—

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(1) development-phase activities, including planning, feasibility analysis, revenue forecasting, environmental review, permitting, preliminary engineering and design work, and other preconstruction activities;

(2) construction, reconstruction, rehabilitation, and replacement activities;

(3) the acquisition of real property (including water rights, land relating to the project, and improvements to land), environmental mitigation, construction contingencies, and acquisition of equipment subject to subsection (c);

(4) capitalized interest necessary to meet market requirements, reasonably required reserve funds, capital issuance expenses, and other carrying costs during construction; and

(5) refinancing interim construction funding, existing long-term project obligations, or a secured loan or loan guarantee made under this subtitle.

(c) Limitation on Use.—The proceeds from Federal credit instruments made available under this subtitle may only be used to acquire non-Federal land or interest in land from a willing seller, when the seller does not contest the purchase or price paid.

SEC. 136. DETERMINATION OF ELIGIBILITY AND PROJECT SELECTION.

(a) Eligibility Requirements.—To be eligible to receive financial assistance under this subtitle, a project shall meet the following criteria, as determined by the Secretary of the Interior:

(1) CREDITWORTHINESS.—

(A) IN GENERAL.—Subject to subparagraph (B), the project shall be creditworthy, as determined by the Secretary of the Interior, who shall ensure that any financing for the project has appropriate security features, such as a rate covenant, to ensure repayment.

(B) PRELIMINARY RATING OPINION LETTER.—The Secretary of the Interior shall require each applicant to provide a preliminary rating opinion letter from at least 1 rating agency indicating that the senior obligations of the project (which may be the Federal credit instrument) have the potential to achieve an investment-grade rating.

(2) ELIGIBLE PROJECT COSTS.—The eligible project costs of a project shall be reasonably anticipated to be not less than \$20,000,000.

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1 (3) DEDICATED REVENUE SOURCES.—The Federal credit instrument
2 for the project shall be repayable, in whole or in part, from dedicated
3 revenue sources that also secure the project obligations.

4 (4) PUBLIC SPONSORSHIP OF PRIVATE ENTITIES.—A project carried
5 out by a private entity shall be sponsored by a State, department of a
6 State, subdivision of a State, or a public agency organized pursuant to
7 State law.

8 (b) Selection Criteria.—

9 (1) ESTABLISHMENT.—The Secretary of the Interior shall establish
10 criteria for the selection of projects that meet the eligibility
11 requirements of subsection (a), in accordance with paragraph (2).

12 (2) CRITERIA.—The selection criteria shall include the following:

13 (A) The extent to which a project serves a region with
14 significant water resources challenges.

15 (B) The extent to which the project is nationally or regionally
16 significant.

17 (C) The extent to which assistance under this section would
18 foster innovative public-private partnerships and attract private
19 debt or equity investment.

20 (D) The extent to which the project fosters—

21 (i) collaborative partnerships between cities, counties,
22 water districts, and State and Federal agencies; and

23 (ii) innovative recycling programs that augment a
24 combination of industrial, commercial, residential, and
25 agricultural uses.

26 (E) The likelihood that assistance under this section would
27 enable the project to proceed at an earlier date than the project
28 would otherwise be able to proceed.

29 (F) The amount of budget authority required to fund the
30 Federal credit instrument made available under this subtitle.

31 (G) The extent to which the project helps maintain or protect
32 the environment.

33 (3) CONSISTENCY OF CRITERIA.—Not later than 180 days after the
34 date of enactment of this Act, the Secretary of the Interior shall issue
35 eligibility requirements under this title for water recycling projects
36 that reclaim and reuse municipal, industrial, domestic, or agricultural
37 wastewater or impaired ground or surface waters.

38 (c) Receipt of Other Federal Funding.—Receipt of a Federal grant or
39 contract or other Federal funding to support an eligible project shall not
40 preclude the project from being eligible for assistance under this subtitle.

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Assistance under this subtitle shall not be counted as Federal funding under cost-sharing requirements otherwise applicable to a project eligible for assistance under this subtitle.

SEC. 137. SECURED LOANS.

(a) Agreements.—

(1) IN GENERAL.—Subject to paragraphs (2) through (4), the Secretary of the Interior may enter into agreements with 1 or more obligors to make secured loans, the proceeds of which shall be used—

(A) to finance eligible project costs of any project selected under section 136;

(B) to refinance interim construction financing of eligible project costs of any project selected under section 136; or

(C) to refinance long-term project obligations or Federal credit instruments, if that refinancing provides additional funding capacity for the completion, enhancement, or expansion of any project that—

(i) is selected under section 136; or

(ii) otherwise meets the requirements of section 136.

(2) LIMITATION ON REFINANCING OF INTERIM CONSTRUCTION FINANCING.—A secured loan under paragraph (1) shall not be used to refinance interim construction financing under paragraph (1)(B) later than 1 year after the date of substantial completion of the applicable project.

(3) RISK ASSESSMENT.—Before entering into an agreement under this subsection for a secured loan, the Secretary of the Interior, in consultation with the Director of the Office of Management and Budget and each rating agency providing a preliminary rating opinion letter under section 136(a)(1)(B), shall determine an appropriate capital reserve subsidy amount for the secured loan, taking into account each such preliminary rating opinion letter.

(4) INVESTMENT-GRADE RATING REQUIREMENT.—The execution of a secured loan under this section shall be contingent on receipt by the senior obligations of the project of an investment-grade rating.

(b) Terms and Limitations.—

(1) IN GENERAL.—A secured loan provided for a project under this section shall be subject to such terms and conditions, and contain such covenants, representations, warranties, and requirements (including requirements for audits), as the Secretary of the Interior determines to be appropriate.

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(2) NONSUBORDINATION.—A secured loan under this section shall not be subordinated to the claims of any holder of project obligations in the event of bankruptcy, insolvency, or liquidation of the obligor of the project.

(3) MAXIMUM AMOUNT.—The amount of a secured loan under this section shall not exceed the lesser of—

(A) an amount equal to 49 percent of the reasonably anticipated eligible project costs; and

(B) if the secured loan does not receive an investment-grade rating, an amount equal to other project obligations that have received an investment-grade rating.

(4) PAYMENT.—A secured loan under this section—

(A) shall be payable, in whole or in part, from State or local taxes, user fees, or other dedicated revenue sources that also secure the senior project obligations of the relevant project;

(B) shall include a rate covenant, coverage requirement, or similar security feature supporting the project obligations; and

(C) may have a lien on revenues described in subparagraph (A), subject to any lien securing project obligations.

(5) INTEREST RATE.—The interest rate on a secured loan under this section shall be not less than the yield on United States Treasury securities of a similar maturity to the maturity of the secured loan on the date of execution of the loan agreement.

(6) MATURITY DATE.—The final maturity date of a secured loan under this section shall be not later than 35 years after the date of substantial completion of the relevant project.

(7) FEES.—The Secretary of the Interior may establish fees, in accordance with section 138(b)(2) at a level sufficient to cover all or a portion of the costs to the Federal Government of making a secured loan under this section.

(8) NON-FEDERAL SHARE.—The proceeds of a secured loan under this section may be used to pay any non-Federal share of project costs required if the loan is repayable from non-Federal funds.

(9) MAXIMUM FEDERAL INVOLVEMENT.—The total amount of Federal assistance provided for a project for which assistance is provided under this subtitle from all sources (including this subtitle) shall not exceed 80 percent of the total cost of the project.

(c) Repayment.—

(1) SCHEDULE.—The Secretary of the Interior shall establish a repayment schedule for each secured loan provided under this

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section, based on the projected cash flow from project revenues and other repayment sources.

(2) COMMENCEMENT.—Scheduled loan repayment of principal or interest on a secured loan under this section shall commence not later than 5 years after the date of substantial completion of the project, with interest accruing during those 5 years and during construction.

(3) DEFERRED PAYMENTS.—

(A) AUTHORIZATION.—If, at any time after the date of substantial completion of a project for which a secured loan is provided under this section, the project is unable to generate sufficient revenues to pay the scheduled loan repayments of principal and interest on the secured loan, the Secretary of the Interior may allow the obligor, subject to subparagraph (C), to add unpaid principal and interest to the outstanding balance of the secured loan.

(B) INTEREST.—Any payment deferred under subparagraph (A) shall—

(i) continue to accrue interest in accordance with subsection (b)(5) until fully repaid; and

(ii) be scheduled to be amortized over the remaining term of the secured loan.

(C) CRITERIA.—

(i) IN GENERAL.—Any payment deferral under subparagraph (A) shall be contingent on the project meeting such criteria as the Secretary of the Interior may establish.

(ii) REPAYMENT STANDARDS.—The criteria established under clause (i) shall include standards for reasonable assurance of repayment.

(4) PREPAYMENT.—

(A) USE OF EXCESS REVENUES.—Any excess revenues that remain after satisfying scheduled debt service requirements on the project obligations and secured loan and all deposit requirements under the terms of any trust agreement, bond resolution, or similar agreement securing project obligations may be applied annually to prepay a secured loan under this section without penalty.

(B) USE OF PROCEEDS OF REFINANCING.—A secured loan under this section may be prepaid at any time without penalty from the proceeds of refinancing from non-Federal funding sources.

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1 (d) Sale of Secured Loans.—

2 (1) IN GENERAL.—Subject to paragraph (2), as soon as practicable
3 after the date of substantial completion of a project and after
4 providing a notice to the obligor, the Secretary of the Interior may
5 sell to another entity or reoffer into the capital markets a secured loan
6 for a project under this section, if the Secretary of the Interior
7 determines that the sale or reoffering can be made on favorable terms.

8 (2) CONSENT OF OBLIGOR.—In making a sale or reoffering under
9 paragraph (1), the Secretary of the Interior may not change the
10 original terms and conditions of the secured loan without the written
11 consent of the obligor.

12 (e) Loan Guarantees.—

13 (1) IN GENERAL.—The Secretary of the Interior may provide a loan
14 guarantee to a lender in lieu of making a secured loan under this
15 section, if the Secretary of the Interior determines that the budgetary
16 cost of the loan guarantee is substantially the same as that of a
17 secured loan.

18 (2) TERMS.—The terms of a loan guarantee provided under this
19 subsection shall be consistent with the terms established in this
20 section for a secured loan, except that the rate on the guaranteed loan
21 and any prepayment features shall be negotiated between the obligor
22 and the lender, with the consent of the Secretary of the Interior.

23 **SEC. 138. PROGRAM ADMINISTRATION.**

24 (a) Requirement.—The Secretary of the Interior shall establish a
25 uniform system to service the Federal credit instruments made available
26 under this subtitle.

27 (b) Reclamation Loan Finance Capital Reserve Fund.—

28 (1) ESTABLISHMENT.—

29 (A) IN GENERAL.—There is established in the Treasury of the
30 United States a fund, to be known as the “Reclamation Loan
31 Finance Capital Reserve Fund”.

32 (B) DEPOSITS TO FUND.—The Secretary of the Treasury shall
33 deposit in the fund established by subparagraph (A) an amount
34 equal to the amount of capital reserve fees collected under
35 paragraph (2) for each applicable fiscal year.

36 (C) TREATMENT.—The amounts deposited in the fund under
37 subparagraph (B) shall be credited as offsetting collections.

38 (2) CAPITAL RESERVE FEES.—

39 (A) IN GENERAL.—To the extent required by appropriations

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1 Acts, the Secretary of the Interior may assess, collect, and spend
2 capital reserve fees at a level that is sufficient to cover all or a
3 portion of the costs to the Federal Government of servicing the
4 Federal credit instruments provided under this subtitle, including
5 all or a portion of the outlays associated with the provision of
6 the Federal credit instruments under this subtitle.

7 (B) AMOUNT.—The capital reserve fees under this paragraph
8 shall be established at amounts that will result in the collection,
9 during each fiscal year, of an amount that can be reasonably
10 expected to equal the outlays associated with the provision of
11 the Federal credit instruments under this subtitle.

12 (c) Servicer.—

13 (1) IN GENERAL.—The Secretary of the Interior may appoint a
14 financial entity to assist the Secretary in servicing the Federal credit
15 instruments provided under this subtitle.

16 (2) DUTIES.—A servicer appointed under paragraph (1) shall act as
17 the agent for the Secretary of the Interior.

18 (3) FEE.—A servicer appointed under paragraph (1) shall receive a
19 servicing fee, subject to approval by the Secretary of the Interior.

20 SEC. 139. STATE AND LOCAL PERMITS.

21 (a) Establishment of Pilot Program.—

22 (1) ASSUMPTION OF RESPONSIBILITY.—

23 (A) IN GENERAL.—Subject to the provisions of the pilot
24 program established by this section, the Secretary of the Interior
25 and a State identified pursuant to subsection (b) may enter into a
26 written agreement, which may be in the form of a memorandum
27 of understanding, under which the Secretary of the Interior may
28 designate the State as lead agency for purposes of the National
29 Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

30 (B) PROCEDURAL AND SUBSTANTIVE REQUIREMENTS.—If
31 designated as the lead agency under subparagraph (A), the State
32 shall assume responsibility under this section, subject to the
33 same procedural and substantive requirements that would apply
34 if that responsibility were carried out by the Secretary of the
35 Interior.

36 (2) PRESERVATION OF FEDERAL RESPONSIBILITY AND AUTHORITY.—

37 (A) FEDERAL RESPONSIBILITY.—Any responsibility of the
38 Secretary of the Interior not explicitly assumed by the State by
39 written agreement under this section shall remain the
40 responsibility of the Secretary of the Interior.

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1 (B) NO EFFECT ON AUTHORITY.—Nothing in this section
2 preempts or interferes with any power, jurisdiction,
3 responsibility, or authority of an agency, other than the
4 Department of the Interior, under applicable law (including
5 regulations) with respect to a project.

6 (3) PRESERVATION OF FLEXIBILITY.—The Secretary of the Interior
7 may not require a State, as a condition of participation and assuming
8 lead agency status in the pilot program under this section, to forego
9 project delivery methods that are otherwise permissible for projects.

10 (b) State Participation.—

11 (1) PARTICIPATING STATES.—The Secretary of the Interior shall
12 permit the State of California, and not more than 4 additional States,
13 to participate in the pilot program under this section, subject to the
14 limitations described in paragraph (4).

15 (2) APPLICATION.—Not later than 270 days after the date of
16 enactment of this Act, the Secretary of the Interior shall amend, as
17 appropriate, regulations that establish requirements relating to
18 information required to be contained in an application of a State to
19 participate in the pilot program under this section and to assume lead
20 agency status, including, at a minimum—

21 (A) the projects or classes of projects for which the State
22 anticipates exercising the authority that may be granted under
23 the pilot program under this section;

24 (B) verification of the financial, regulatory, and enforcement
25 resources necessary to carry out the authority that may be
26 granted under the pilot program under this section; and

27 (C) evidence of the notice and solicitation of public comment
28 by the State relating to participation of the State in the pilot
29 program under this section, including copies of comments
30 received from that solicitation.

31 (3) PUBLIC NOTICE.—

32 (A) IN GENERAL.—A State that submits an application under
33 this subsection shall give notice of the intent of the State to
34 participate in the pilot program under this section not later than
35 30 days before the date of submission of the application.

36 (B) METHOD OF NOTICE AND SOLICITATION.—A State shall
37 provide notice and solicit public comment under this paragraph
38 by publishing the complete application of the State in
39 accordance with the appropriate public notice State law.

40 (4) SELECTION CRITERIA.—The Secretary of the Interior may
41 approve the application of a State under this section only if—

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1 (A) the regulatory requirements of paragraph (2) have been
2 met;

3 (B) the Secretary of the Interior determines that the State has
4 the capability, including financial, regulatory, and enforcement
5 capability and personnel, to assume the responsibility of a lead
6 agency for the project; and

7 (C) the head of the State agency with primary jurisdiction
8 over water infrastructure matters enters into a written agreement
9 with the Secretary of the Interior described in subsection (c).

10 (c) Written Agreement.—A written agreement under this section
11 shall—

12 (1) be executed by the Governor or the top ranking water
13 infrastructure official in the State who is charged with responsibility
14 for water infrastructure construction;

15 (2) be in such form as the Secretary of the Interior may prescribe;

16 (3) provide that the State—

17 (A) agrees to assume all or part of the responsibilities of the
18 Secretary of the Interior described in subsection (a), including
19 all responsibilities as a lead agency;

20 (B) expressly consents, on behalf of the State, to accept the
21 jurisdiction of the Federal courts for the compliance, discharge,
22 and enforcement of any responsibility of the Secretary of the
23 Interior assumed by the State;

24 (C) certifies that State laws (including regulations) are in
25 effect that authorize the State to take the actions necessary to
26 carry out the responsibilities being assumed; and

27 (D) agrees to maintain the financial resources necessary to
28 carry out the responsibilities being assumed;

29 (4) require the State to provide to the Secretary of the Interior any
30 information that the Secretary of the Interior considers necessary to
31 ensure that the State is adequately carrying out the responsibilities
32 assigned to the State;

33 (5) have a term of not more than 5 years; and

34 (6) be renewable.

35 (d) Jurisdiction.—

36 (1) IN GENERAL.—The United States district courts shall have
37 exclusive jurisdiction over any civil action against a State for failure
38 to carry out any responsibility of the State under this section.

39 (2) LEGAL STANDARDS AND REQUIREMENTS.—A civil action under

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paragraph (1) shall be governed by the legal standards and requirements that would apply in such a civil action against the Secretary of the Interior if the Secretary of the Interior had taken the actions in question.

(3) INTERVENTION.—The Secretary of the Interior shall have the right to intervene in any action described in paragraph (1).

(e) Effect of Assumption of Responsibility.—A State that assumes responsibility under subsection (a)(2) shall be solely responsible and solely liable for carrying out, in lieu of the Secretary of the Interior, the responsibilities assumed under subsection (a), until the pilot program is terminated as provided in subsection (h).

(f) Audits.—

(1) IN GENERAL.—To ensure compliance by a State with any agreement of the State under subsection (c) (including compliance by the State with all Federal laws for which responsibility is assumed under subsection (a)(2)), for each State participating in the pilot program under this section, the Secretary of the Interior shall conduct—

(A) semiannual audits during each of the first 2 years of State participation; and

(B) annual audits during of the third and fourth years of State participation.

(2) PUBLIC AVAILABILITY AND COMMENT.—

(A) IN GENERAL.—An audit conducted under paragraph (1) shall be made available to the public for comment.

(B) RESPONSE.—Not later than 60 days after the date on which the period for public comment ends, the Secretary of the Interior shall respond to public comments received under subparagraph (A).

(g) Monitoring.—After the fourth year of the participation of a State in the pilot program, the Secretary of the Interior shall monitor compliance by the State with the written agreement, including the provision by the State of financial resources to carry out the written agreement.

(h) Termination.—

(1) TERMINATION BY SECRETARY OF THE INTERIOR.—The Secretary of the Interior may terminate the participation of any State in the pilot program if—

(A) the Secretary of the Interior determines that the State is not adequately carrying out the responsibilities assigned to the State;

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(B) the Secretary of the Interior provides to the State—

(i) notification of the determination of noncompliance;
and

(ii) a period of at least 30 days during which to take such
corrective action as the Secretary of the Interior determines
is necessary to comply with the applicable agreement; and

(C) the State, after the notification and period provided under
subparagraph (B), fails to take satisfactory corrective action, as
determined by Secretary of the Interior.

(2) TERMINATION BY STATE.—The State may terminate the
participation of the State in the pilot program at any time by
providing to the Secretary of the Interior a notice by not later than the
date that is 90 days before the date of termination, and subject to such
terms and conditions as the Secretary of the Interior may provide.

(i) Limitations on Agreements.—Nothing in this section or pilot
program—

(1) authorizes a State to assume any rulemaking authority of the
Secretary of the Interior under any Federal law;

(2) relieves any recipient of the assistance of any obligation to
obtain any other required State or local permit or approval with
respect to the project;

(3) limits the right of any unit of State or local government to
approve or regulate any rate of return on private equity invested in
the project; or

(4) otherwise supersedes any State or local law (including any
regulation) applicable to the construction or operation of the project.

SEC. 140. REGULATIONS.

The Secretary of the Interior may promulgate such regulations as the
Secretary of the Interior determines to be appropriate to carry out this
subtitle.

SEC. 141. FUNDING.

(a) In General.—There is authorized to be appropriated to the Secretary
of the Interior to carry out this subtitle \$200,000,000.

(b) Offset Required.—No funds made available under this section may
be used to provide financial assistance under this subtitle unless sufficient
funds have been appropriated to offset any decrease in Federal revenue
resulting from the use by any unit of State or local government of
proceeds of any obligation—

(1) the interest on which is exempt from the tax imposed under

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1 chapter 1 of the Internal Revenue Code of 1986; or

2 (2) with respect to which credit is allowable under subpart I or J of
3 part IV of subchapter A of chapter 1 of that Code.

4 (c) Administrative Costs.—Of the funds made available to carry out this
5 subtitle, the Secretary of the Interior may use for the administration of this
6 subtitle not more than \$2,200,000 for each of fiscal years 2016 through
7 2020.

8 TITLE II—LISTED SPECIES AND WILDLIFE

9 SEC. 201. ACTIONS TO BENEFIT 10 ENDANGERED FISH POPULATIONS.

11 (a) Findings.—Congress finds that—

12 (1) minimizing or eliminating stressors to fish and their habitat in
13 an efficient and structured manner is a key aspect of a fish recovery
14 strategy;

15 (2) functioning, diverse, and interconnected habitats are necessary
16 for a species to be viable; and

17 (3) providing for increased fish habitat may not only allow for a
18 more robust fish recovery, but also reduce impacts to water supplies.

19 (b) Actions for Benefit of Endangered Species.—There is authorized to
20 be appropriated the following amounts:

21 (1) \$35,000,000 for the Secretary of Commerce, through the
22 Administrator of the National Oceanic and Atmospheric
23 Administration, to carry out the following activities in accordance
24 with the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.):

25 (A) Gravel and rearing area additions and habitat restoration
26 to the Sacramento River to benefit Chinook salmon and
27 steelhead trout.

28 (B) Alternative methods, models, and equipment to improve
29 temperature modeling and related forecasted information for
30 purposes of predicting impacts to salmon and salmon habitat as
31 a result of water management at Shasta.

32 (C) Methods to improve the Delta salvage systems, including
33 alternative methods to redeposit salvaged salmon smolts and
34 other fish from the Delta in a manner that reduces predation
35 losses.

36 (2) \$6,000,000 for the Secretary of the Interior to conduct the Delta
37 smelt distribution study referenced in section 301.

38 (c) Commencement.—If the Administrator of the National Oceanic and

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1 Atmospheric Administration determines that a proposed activity is feasible
2 and beneficial for protecting and recovering a fish population, the
3 Administrator shall commence implementation of the activity by not later
4 than 1 year after the date of enactment of this Act.

5 (d) Consultation.—The Administrator shall take such steps as are
6 necessary to partner with, and coordinate the efforts of, the Department of
7 the Interior, the Department of Commerce, and other relevant Federal
8 departments and agencies to ensure that all Federal reviews, analyses,
9 opinions, statements, permits, licenses, and other approvals or decisions
10 required under Federal law are completed on an expeditious basis,
11 consistent with Federal law.

12 (e) Trap and Barge Pilot Program.—

13 (1) IN GENERAL.—The Department of Commerce, in collaboration
14 with the Department of the Interior, the California Department of
15 Fish and Wildlife, applicable water agencies, and other interested
16 parties, shall design, permit, implement, and evaluate a pilot program
17 to test the efficacy of an experimental trap and barge program to
18 improve survival of juvenile salmonids emigrating from the San
19 Joaquin watershed through the Delta.

20 (2) PLAN.—

21 (A) WORKING GROUP.—Not later than 30 days after the date
22 of enactment of this Act, the Assistant Administrator and the
23 Commissioner shall convene a working group, to be comprised
24 of representatives of relevant agencies and other interested
25 parties, to develop and execute a plan for the design, budgeting,
26 implementation, and evaluation of the pilot program under this
27 subsection, using such existing expertise regarding trap and
28 barge programs as may be available.

29 (B) REQUIREMENTS.—The plan under this paragraph shall—

30 (i) include a schedule and budget for the pilot program;
31 and

32 (ii) identify the responsible parties for each element of
33 the program.

34 (3) IMPLEMENTATION.—The Assistant Administrator and the
35 Commissioner shall seek to commence implementation of the pilot
36 program under this subsection during calendar year 2016, if
37 practicable.

38 (4) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to
39 be appropriated to carry out this subsection \$4,000,000.

40 (f) Conservation Fish Hatcheries.—

41 (1) IN GENERAL.—Not later than 2 years after the date of enactment

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of this Act, the Secretaries of the Interior and Commerce, in coordination with the Director of the California Department of Fish and Wildlife, shall develop and implement as necessary the expanded use of conservation hatchery programs to enhance, supplement, and rebuild Delta smelt and Endangered Species Act-listed fish species under the smelt and salmonid biological opinions.

(2) REQUIREMENTS.—The conservation hatchery programs established under paragraph (1) and the associated hatchery and genetic management plans shall be designed—

(A) to benefit, enhance, support, and otherwise recover naturally spawning fish species to the point where the measures provided under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) are no longer necessary; and

(B) to minimize adverse effects to Central Valley Project and State Water Project operations.

(3) PRIORITY; COOPERATIVE AGREEMENTS.—In implementing this section, the Secretaries of the Interior and Commerce—

(A) shall give priority to existing and prospective hatchery programs and facilities within the Delta and the riverine tributaries thereto; and

(B) may enter into cooperative agreements for the operation of conservation hatchery programs with States, Indian tribes, and other nongovernmental entities for the benefit, enhancement, and support of naturally spawning fish species.

(g) Acquisition of Land, Water, or Interests From Willing Sellers for Environmental Purposes in California.—

(1) IN GENERAL.—The Secretary of the Interior is authorized to acquire by purchase, lease, donation, or otherwise, land, water, or interests in land or water from willing sellers in California—

(A) to benefit listed or candidate species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or the California Endangered Species Act (California Fish and Game Code sections 2050 through 2116);

(B) to meet requirements of, or otherwise provide water quality benefits under, the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) or the Porter Cologne Water Quality Control Act (division 7 of the California Water Code); or

(C) for protection and enhancement of the environment, as determined by the Secretary of the Interior.

(2) FINANCIAL ASSISTANCE.—In implementing this section, the Secretary of the Interior is authorized to provide financial assistance

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to the State of California or otherwise hold such interests in joint ownership with the State of California based on a cost share deemed appropriate by the Secretary.

(3) TREATMENT.—Any expenditures under this subsection shall be nonreimbursable and nonreturnable to the United States.

SEC. 202. ACTIONS TO BENEFIT REFUGES.

(a) In General.—In addition to funding under section 3407 of the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4726), there is authorized to be appropriated to the Secretary of the Interior \$2,000,000 for each of fiscal years 2016 through 2020 for the acceleration and completion of water infrastructure and conveyance facilities necessary to achieve full water deliveries to Central Valley wildlife refuges and habitat areas pursuant to section 3406(d) of that Act (Public Law 102–575; 106 Stat. 4722).

(b) Cost-sharing.—

(1) FEDERAL SHARE.—The Federal share of the cost of carrying out an activity described in this section shall be not more than 50 percent.

(2) NON-FEDERAL SHARE.—The non-Federal share of the cost of carrying out an activity described in this section—

(A) shall be not less than 50 percent; and

(B) may be provided in cash or in-kind.

SEC. 203. NON-FEDERAL PROGRAM TO PROTECT NATIVE ANADROMOUS FISH IN STANISLAUS RIVER.

(a) Definition of District.—In this section, the term “district” means—

(1) the Oakdale Irrigation District of the State of California; and

(2) the South San Joaquin Irrigation District of the State of California.

(b) Establishment.—The Secretary of Commerce, acting through the Assistant Administrator of the National Marine Fisheries Service, and the districts, in consultation with the Director of the California Department of Fish and Wildlife, shall jointly establish and conduct a nonnative predator research and pilot fish removal program to study the effects of removing from the Stanislaus River—

(1) nonnative striped bass, smallmouth bass, largemouth bass, black bass; and

(2) other nonnative predator fish species.

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- 1 (c) Requirements.—The program under this section shall—
2 (1) be scientifically based, with research questions determined
3 jointly by—
4 (A) National Marine Fisheries Service scientists; and
5 (B) technical experts of the districts;
6 (2) include methods to quantify by, among other things, evaluating
7 the number of juvenile anadromous fish that migrate past the rotary
8 screw trap located at Caswell—
9 (A) the number and size of predator fish removed each year;
10 and
11 (B) the impact of the removal on—
12 (i) the overall abundance of predator fish in the
13 Stanislaus River; and
14 (ii) the populations of juvenile anadromous fish in the
15 Stanislaus River;
16 (3) among other methods, consider using wire fyke trapping,
17 portable resistance board weirs, and boat electrofishing; and
18 (4) be implemented as quickly as practicable after the date of
19 issuance of all necessary scientific research permits.
20 (d) Management.—The management of the program shall be the joint
21 responsibility of the Assistant Administrator and the districts, which
22 shall—
23 (1) work collaboratively to ensure the performance of the program;
24 and
25 (2) discuss and agree on, among other things—
26 (A) qualified scientists to lead the program;
27 (B) research questions;
28 (C) experimental design;
29 (D) changes in the structure, management, personnel,
30 techniques, strategy, data collection and access, reporting, and
31 conduct of the program; and
32 (E) the need for independent peer review.
33 (e) Conduct.—
34 (1) IN GENERAL.—For each applicable calendar year, the districts,
35 on agreement of the Assistant Administrator, may elect to conduct
36 the program under this section using—
37 (A) the personnel of the Assistant Administrator or districts;

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- 1 (B) qualified private contractors hired by the districts;
2 (C) personnel of, on loan to, or otherwise assigned to the
3 National Marine Fisheries Service; or
4 (D) a combination of the individuals described in
5 subparagraphs (A) through (C).
- 6 (2) PARTICIPATION BY NATIONAL MARINE FISHERIES SERVICE.—
- 7 (A) IN GENERAL.—If the districts elect to conduct the program
8 using district personnel or qualified private contractors hired
9 under subparagraph (A) or (B) of paragraph (1), the Assistant
10 Administrator may assign an employee of, on loan to, or
11 otherwise assigned to the National Marine Fisheries Service, to
12 be present for all activities performed in the field to ensure
13 compliance with subsection (d).
- 14 (B) COSTS.—The districts shall pay the cost of participation
15 by the employee under subparagraph (A), in accordance with
16 subsection (f).
- 17 (3) TIMING OF ELECTION.—The districts shall notify the Assistant
18 Administrator of an election under paragraph (1) by not later than
19 October 15 of the calendar year preceding the calendar year for
20 which the election applies.
- 21 (f) Funding.—
- 22 (1) IN GENERAL.—The districts shall be responsible for 100 percent
23 of the cost of the program.
- 24 (2) CONTRIBUTED FUNDS.—The Secretary of Commerce may
25 accept and use contributions of funds from the districts to carry out
26 activities under the program.
- 27 (3) ESTIMATION OF COST.—
- 28 (A) IN GENERAL.—Not later than December 1 of each year of
29 the program, the Secretary of Commerce shall submit to the
30 districts an estimate of the cost to be incurred by the National
31 Marine Fisheries Service for the program during the following
32 calendar year, if any, including the cost of any data collection
33 and posting under subsection (g).
- 34 (B) FAILURE TO FUND.—If an amount equal to the estimate of
35 the Secretary of Commerce is not provided through
36 contributions pursuant to paragraph (2) before December 31 of
37 that calendar year—
- 38 (i) the Secretary shall have no obligation to conduct the
39 program activities otherwise scheduled for the following
40 calendar year until the amount is contributed by the

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1 districts; and

2 (ii) the districts may not conduct any aspect of the
3 program until the amount is contributed by the districts.

4 (4) ACCOUNTING.—

5 (A) IN GENERAL.—Not later than September 1 of each year,
6 the Secretary of Commerce shall provide to the districts an
7 accounting of the costs incurred by the Secretary for the
8 program during the preceding calendar year.

9 (B) EXCESS AMOUNTS.—If the amount contributed by the
10 districts pursuant to paragraph (2) for a calendar year was
11 greater than the costs incurred by the Secretary of Commerce
12 during that year, the Secretary shall—

13 (i) apply the excess amounts to the cost of activities to be
14 performed by the Secretary under the program, if any,
15 during the following calendar year; or

16 (ii) if no such activities are to be performed, repay the
17 excess amounts to the districts.

18 (g) Publication and Evaluation of Data.—

19 (1) IN GENERAL.—All data generated through the program,
20 including by any private consultants, shall be routinely provided to
21 the Assistant Administrator.

22 (2) INTERNET.—Not later than the 15th day of each month of the
23 program, the Assistant Administrator shall publish on the Internet
24 website of the National Marine Fisheries Service a tabular summary
25 of the raw data collected under the program during the preceding
26 month.

27 (3) REPORT.—On completion of the program, the Assistant
28 Administrator shall prepare a final report evaluating the effectiveness
29 of the program, including recommendations for future research and
30 removal work.

31 (h) Consistency With Law.—

32 (1) IN GENERAL.—The programs in this section and section 204 are
33 found to be consistent with the requirements of the Central Valley
34 Project Improvement Act (Public Law 102–575; 106 Stat. 4706).

35 (2) LIMITATION.—No provision, plan, or definition under that Act,
36 including section 3406(b)(1) of that Act (Public Law 102–575; 106
37 Stat. 4714), shall be used—

38 (A) to prohibit the implementation of the programs in this
39 section and section 204; or

40 (B) to prevent the accomplishment of the goals of the

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1 programs.

2 (3) STATE LAW.—The Secretary of the Interior, the Secretary of
3 Commerce, and the participating districts shall comply with
4 applicable requirements of State law with respect to the program
5 under this subsection.

6 SEC. 204. PILOT PROJECTS TO IMPLEMENT 7 CALFED INVASIVE SPECIES PROGRAM.

8 (a) In General.—Not later than January 1, 2017, the Secretary of the
9 Interior, in collaboration with the Secretary of Commerce, the Director of
10 the California Department of Fish and Wildlife, and other relevant
11 agencies and interested parties, shall establish and carry out pilot projects
12 to implement the invasive species control program under section
13 103(d)(6)(A)(iv) of Public Law 108–361 (118 Stat. 1690).

14 (b) Requirements.—The pilot projects under this section shall—

15 (1) seek to reduce invasive aquatic vegetation (such as water
16 hyacinth), predators, and other competitors that contribute to the
17 decline of native listed pelagic and anadromous species that occupy
18 the Sacramento and San Joaquin Rivers and their tributaries and the
19 Delta; and

20 (2) remove, reduce, or control the effects of species including
21 Asiatic clams, silversides, gobies, Brazilian water weed, largemouth
22 bass, smallmouth bass, striped bass, crappie, bluegill, white and
23 channel catfish, zebra and quagga mussels, and brown bullheads.

24 (c) Emergency Environmental Reviews.—To expedite environmentally
25 beneficial programs in this title for the conservation of threatened and
26 endangered species, the Secretaries of the Interior and Commerce shall
27 consult with the Council on Environmental Quality in accordance with
28 section 1506.11 of title 40, Code of Federal Regulations (or successor
29 regulations), to develop alternative arrangements to comply with the
30 National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) for
31 those programs.

32 TITLE III—CALIFORNIA EMERGENCY 33 DROUGHT RELIEF AND OPERATIONAL 34 FLEXIBILITY

35 SEC. 301. TAKING INTO ACCOUNT 36 INCREASED REAL-TIME MONITORING 37 AND UPDATED SCIENCE.

38 (a) Smelt Biological Opinion.—The Director shall use the best scientific

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1 and commercial data available to implement, continuously evaluate, and
2 refine or amend, as appropriate, the reasonable and prudent alternative
3 described in the smelt biological opinion.

4 (b) Increased Monitoring to Inform Real-time Operations.—

5 (1) IN GENERAL.—The Secretary of the Interior shall conduct
6 additional surveys, on an annual basis at the appropriate time of year
7 based on environmental conditions, in collaboration with interested
8 stakeholders regarding the science of the Delta in general, and to
9 enhance real time decisionmaking in particular, working in close
10 coordination with relevant State authorities.

11 (2) REQUIREMENTS.—In carrying out this subsection, the Secretary
12 of the Interior shall use—

13 (A) the most appropriate and accurate survey methods
14 available for the detection of Delta smelt to determine the extent
15 to which adult Delta smelt are distributed in relation to certain
16 levels of turbidity or other environmental factors that may
17 influence salvage rate; and

18 (B) results from appropriate surveys for the detection of Delta
19 smelt to determine how the Central Valley Project and State
20 Water Project may be operated more efficiently to maximize
21 fish and water supply benefits.

22 (3) WINTER MONITORING.—During the period between December
23 1 and March 31, if suspended sediment loads enter the Delta from the
24 Sacramento River, and the suspended sediment loads appear likely to
25 raise turbidity levels in the Old River north of the export pumps from
26 values below 12 Nephelometric Turbidity Units (NTUs) to values
27 above 12 NTUs, the Secretary of the Interior shall—

28 (A) conduct daily monitoring using appropriate survey
29 methods at locations including the vicinity of Station 902 to
30 determine the extent to which adult Delta smelt are moving with
31 turbidity toward the export pumps; and

32 (B) use results from the monitoring under subparagraph (A) to
33 determine how increased trawling can inform daily real-time
34 Central Valley Project and State Water Project operations to
35 maximize fish and water supply benefits.

36 (c) Periodic Review of Monitoring.—Not later than 1 year after the date
37 of enactment of this Act, the Secretary of the Interior shall—

38 (1) evaluate whether the monitoring program under subsection (b),
39 combined with other monitoring programs for the Delta, is providing
40 sufficient data to inform Central Valley Project and State Water
41 Project operations to maximize the water supply for fish and water
42 supply benefits; and

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1 (2) determine whether the monitoring efforts should be changed in
2 the short or long term to provide more useful data.

3 (d) Delta Smelt Distribution Study.—

4 (1) IN GENERAL.—Not later than March 15, 2019, the Secretary of
5 the Interior shall—

6 (A) complete studies, to be initiated by not later than 90 days
7 after the date of enactment of this Act, designed—

8 (i) to understand the location and distribution of Delta
9 smelt throughout the range of the Delta smelt; and

10 (ii) to determine potential methods to minimize the
11 effects of Central Valley Project and State Water Project
12 operations on the Delta smelt;

13 (B) based on the best available science, if appropriate and
14 practicable, implement new targeted sampling and monitoring of
15 Delta smelt in order to maximize fish and water supply benefits
16 prior to completion of the study under subparagraph (A);

17 (C) to the maximum extent practicable, use new technologies
18 to allow for better tracking of Delta smelt, such as acoustic
19 tagging, optical recognition during trawls, and fish detection
20 using residual deoxyribonucleic acid (DNA); and

21 (D) if new sampling and monitoring is not implemented under
22 subparagraph (B), provide a detailed explanation of the
23 determination of the Secretary of the Interior that no change is
24 warranted.

25 (2) CONSULTATION.—In determining the scope of the studies under
26 this subsection, the Secretary of the Interior shall consult with—

27 (A) Central Valley Project and State Water Project water
28 contractors and public water agencies;

29 (B) other public water agencies;

30 (C) the California Department of Fish and Wildlife and the
31 California Department of Water Resources; and

32 (D) nongovernmental organizations.

33 (e) Scientifically Supported Implementation of OMR Flow
34 Requirements.—

35 (1) ENVIRONMENTAL PROTECTION MANDATE.—The Secretaries of
36 the Interior and Commerce shall take no action pursuant to this Act
37 that would cause additional adverse effects on the listed fish species
38 beyond the range of effects anticipated to occur to the listed fish
39 species for the duration of the applicable biological opinion, using the
40 best scientific and commercial data available.

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(2) REAL-TIME MANAGEMENT TO ACHIEVE MULTIPLE GOALS.—
Building upon previous drought operations in calendar years 2014
and 2015, the Secretaries of the Interior and Commerce shall monitor
in real time to determine the location and densities of listed fish
species relative to the pumps, Delta conditions, and other relevant
factors, in order to identify more accurately and precisely—

(A) opportunities to increase water pumping without violating
the standard in paragraph (1) or other applicable environmental
laws and regulations; and

(B) circumstances where it is necessary to decrease water
pumping to protect listed fish species.

(3) MANAGEMENT.—In implementing the smelt biological opinion
and the salmonid biological opinion, the Secretaries of the Interior
and Commerce shall manage the OMR in accordance with those
opinions to maximize water supplies for the Central Valley Project
and State Water Project, to the extent consistent with paragraph (1).

(4) REVERSE FLOW.—

(A) IN GENERAL.—With respect to the management of reverse
flow in the OMR under the smelt biological opinion, the
Secretary of the Interior shall implement the relevant provisions
of the smelt biological opinion to maximize Central Valley
Project and State Water Project water supplies, to the extent
consistent with paragraph (1).

(B) REQUIREMENTS.—If the Secretary determines to manage
rates of pumping at the C.W. “Bill” Jones and the Harvey O.
Banks pumping plants in the southern Delta to achieve a reverse
OMR flow rate less negative than -5,000 cubic feet per second,
the Secretary shall—

(i) document in writing any significant facts regarding
real-time conditions relevant to the determinations of OMR
reverse flow rates, including—

(I) targeted real-time fish monitoring in the Old
River pursuant to this section, including monitoring in
the vicinity of Station 902; and

(II) near-term forecasts with available salvage
models under prevailing conditions of the effects on
Delta smelt of OMR flow of -5,000 cubic feet per
second; and

(ii) explain in writing why any decision to manage OMR
reverse flow at rates less negative than -5,000 cubic feet per
second is necessary to comply with the environmental
standard in subparagraph (e)(1), after considering relevant

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1 factors such as—

2 (I) the distribution of Delta smelt throughout the
3 Delta;

4 (II) the potential effects of high entrainment risk on
5 subsequent Delta smelt abundance;

6 (III) the water temperature;

7 (IV) other significant factors relevant to the
8 determination, as required by applicable Federal or
9 State laws;

10 (V) turbidity; and

11 (VI) whether any alternative measures could have a
12 substantially lesser water supply impact.

13 (5) IMMEDIATE ACTION.—Nothing in this section shall prevent the
14 Secretaries of the Interior or Commerce from taking immediate
15 action to reduce pumping if necessary to do so to comply with the
16 Endangered Species Act, its implementing regulations, or to avoid
17 additional adverse effects on the listed fish species beyond the range
18 of effects anticipated to occur to the listed fish species for the
19 duration of the applicable biological opinion.

20 (f) First Sediment Flush.—During the first flush of sediment out of the
21 Delta in each water year, based on objective evidence and notwithstanding
22 subsection (e), the Secretary of the Interior may manage OMR flow,
23 pursuant to the portion of the smelt biological opinion that protects adult
24 Delta smelt from the first flush (Action 1 of the Reasonable and Prudent
25 Alternative Component 1), at rates less negative than -5,000 cubic feet per
26 second for the shortest time period necessary to avoid movement of adult
27 Delta smelt to areas in the southern Delta that would be likely to increase
28 entrainment at any Central Valley Project or State Water Project pumping
29 plant.

30 (g) Construction.—The Secretaries of the Interior and Commerce
31 may—

32 (1) implement subsection (e) building on, and taking into account
33 the effects of, previous operations in the 2014 and 2015 water years;
34 and

35 (2) use the results of monitoring through early warning surveys to
36 make real-time operational decisions under the applicable biological
37 opinion.

38 (h) Calculation of Reverse Flow in OMR.—Not later than 180 days
39 after the date of enactment of this Act, the Secretary, in consultation with
40 the California Department of Water Resources, consistent with the smelt
41 biological opinion and the salmonid biological opinion, shall—

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(1) review, including seeking public comment regarding, whether any revision to the method used to calculate reverse flow in the OMR for implementation of the reasonable and prudent alternatives in the smelt biological opinion and the salmonid biological opinion for the purpose of using the best available science and monitoring to maximize fish and water supply benefits is warranted; and

(2) implement the revised method to calculate reverse flow in the OMR pursuant to paragraph (1).

(i) Successor Biological Opinions.—The Secretaries of the Interior and Commerce shall apply the provisions of this Act to successor biological opinions to the salmonid biological opinion and the smelt biological opinion, to the extent that the Secretaries of the Interior and Commerce determine to be consistent with—

(1) section 701(a)(3); and

(2) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and the regulations implementing that Act.

SEC. 302. EMERGENCY OPERATIONS.

(a) Water Supplies.—

(1) IN GENERAL.—The Secretaries of the Interior and Commerce shall provide the maximum quantity of water supplies practicable to Central Valley Project agricultural, municipal, and industrial contractors, water service or repayment contractors, water rights settlement contractors, exchange contractors, refuge contractors, and State Water Project contractors, by approving, in accordance with applicable Federal and State laws (including regulations), operations or temporary projects to provide additional water supplies as quickly as practicable, based on available information, to address the emergency conditions.

(2) APPLICATION.—

(A) IN GENERAL.—Subject to subparagraph (B), paragraph (1) applies to any operation or temporary project involving the Klamath Project, if the project or operation would benefit Federal water contractors or otherwise alleviate drought conditions in the State of California.

(B) EFFECT.—Nothing in this subsection limits or affects the ability of the Secretaries of the Interior and Commerce to meet the legal obligations of the Secretary, including all tribal trust obligations.

(b) Administration.—In carrying out subsection (a), the Secretaries of the Interior and Commerce shall, in accordance with applicable laws (including regulations)—

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(1)(A) in close coordination with the California Department of Water Resources and the California Department of Fish and Wildlife, implement a pilot project to test and evaluate the ability to operate the Delta cross-channel gates daily or as otherwise may be appropriate to keep the gates open to the maximum extent practicable to protect out-migrating salmonids, manage salinities in the interior Delta and any other water quality issues, and maximize Central Valley Project and State Water Project pumping, subject to the condition that the pilot project shall be designed and implemented consistent with operational criteria and monitoring criteria required by the California State Water Resources Control Board, including its order, "Order Approving a Temporary Urgency Change in License and Permit Terms in Response to Drought Conditions", effective on January 31, 2014 (or a successor order); and

(B) design, implement, and evaluate those real-time monitoring capabilities to enable effective real-time operations of the cross-channel in order efficiently to meet the objectives described in subparagraph (A);

(2) with respect to the operation of the Delta cross-channel gates described in paragraph (1), collect data on the impact of that operation on—

(A) species listed as threatened or endangered under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);

(B) water quality; and

(C) water supply benefits;

(3) collaborate with the California Department of Water Resources to install a deflection barrier at Georgiana Slough and the Delta cross-channel gate to protect migrating salmonids, consistent with knowledge gained from related activities carried out during 2014 and 2015;

(4) not later than May 15, 2016, submit to the Committees on Energy and Natural Resources and Environment and Public Works of the Senate and the Committee on Natural Resources of the House of Representatives a notice and explanation regarding the extent to which the gates are able to remain open pursuant to paragraphs (1) through (3);

(5) implement turbidity control strategies that may allow for increased water deliveries while avoiding jeopardy to adult Delta smelt due consistent with the smelt biological opinion;

(6) adopt a 1:1 inflow-to-export ratio for the increment of increased flow, as measured as a 3-day running average at Vernalis during the period beginning on April 1 and ending on May 31, that

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1 results from the voluntary sale, transfer, or exchange, unless the
2 Secretaries of the Interior and Commerce determine in writing that
3 the ratio will cause additional adverse effects on any salmonid listed
4 fish species beyond the range of effects anticipated to occur to the
5 listed fish species for the duration of the salmonid biological opinion
6 using the best scientific and commercial data available and subject to
7 the condition that any individual sale, transfer, or exchange using that
8 ratio may only proceed if—

9 (A) the Secretary of the Interior determines that the
10 environmental effects of the proposed sale, transfer, or exchange
11 are consistent with effects permitted under applicable law
12 (including the Endangered Species Act (16 U.S.C. 1531 et seq.),
13 the Federal Water Pollution Control Act (33 U.S.C. 1381 et
14 seq.), and the Porter-Cologne Water Quality Control Act
15 (California Water Code 13000 et seq.));

16 (B) Delta conditions are suitable to allow movement of the
17 acquired, transferred, or exchanged water through the Delta, in
18 accordance with existing Central Valley Project and State Water
19 Project permitted water rights and the requirements of section
20 3405(a)(1)(H) of the Central Valley Project Improvement Act
21 (Public Law 102–575; 106 Stat. 4711); and

22 (C) the voluntary sale, transfer, or exchange of water results
23 in flow that is in addition to flow that otherwise would occur in
24 the absence of the voluntary sale, transfer, or exchange;

25 (7)(A) issue all necessary permit decisions under the authority of
26 the Secretaries of the Interior and Commerce by not later than 60
27 days after the date of receipt of a completed application by the State
28 of California to place and use temporary barriers or operable gates in
29 Delta channels to improve water quantity and quality for State Water
30 Project and Central Valley Project south-of-Delta water contractors
31 and other water users, which barriers or gates shall provide benefits
32 for species protection and in-Delta water user water quality, subject
33 to the condition that the barriers or gates shall be designed so that, if
34 practicable, formal consultations under section 7 of the Endangered
35 Species Act of 1973 (16 U.S.C. 1536) are not necessary; or

36 (B) take a longer period to issue the permit decisions described in
37 subparagraph (A) only if the Secretaries of the Interior and
38 Commerce determine in writing that an environmental impact
39 statement is needed for the proposal to comply with the National
40 Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.);

41 (8) allow and facilitate, consistent with existing priorities, water
42 transfers through the C.W. “Bill” Jones Pumping Plant or the Harvey
43 O. Banks Pumping Plant during the period beginning on April 1 and

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ending on November 30, subject to the condition that the transfers—

(A) are consistent with applicable Federal and State laws (including regulations), including the California Environmental Quality Act (California Public Resources Code 21000–21177); and

(B) are consistent with the smelt biological opinion and the salmonid biological opinion;

(9) require the Director and the Commissioner—

(A)(i) to determine whether a written transfer proposal is complete by not later than 30 days after the date of submission of the proposal; and

(ii) if the proposal is determined to be incomplete, to State with specificity what shall be supplemented or revised to complete the proposal; and

(B)(i) complete all requirements under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) necessary to make final permit decisions on water transfer requests in the State of California by—

(I) not later than 30 days after the date of receipt of such a request; or

(II) such later date as the Director or the Commissioner determines to be necessary, only if the Director or the Commissioner determines in writing that an environmental impact statement is needed for the proposal to comply with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and

(ii) approve any water transfer request described in clause (i) to maximize the quantity of water supplies, subject to the condition that actions associated with the water transfer comply with applicable Federal and State laws (including regulations) and are consistent with—

(I) existing permitted water rights; and

(II) the requirements of section 3405(a)(1)(H) of the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4711);

(10) in coordination with the Secretary of Agriculture, enter into an agreement with the National Academy of Sciences to conduct a comprehensive study, to be completed not later than 1 year after the date of enactment of this Act, on the effectiveness and environmental impacts of saltcedar biological control efforts on increasing water

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supplies and improving riparian habitats of the Colorado River and its principal tributaries, in the State of California and elsewhere;

(11) pursuant to the research and adaptive management provisions of the smelt biological opinion and the salmonid biological opinion—

(A) use all available scientific tools to identify any changes to real-time operations of Bureau of Reclamation, State of California, or local water projects that could result in the availability of additional water supplies; and

(B) determine whether alternative operational or other management measures would meet applicable regulatory requirements for listed species while maximizing water supplies and water supply reliability; and

(12) continue to vary the averaging period of the maximum percent of Delta Inflow Diverted (Delta export-inflow ratio), to the extent consistent with any applicable California Water Resources Control Board orders under decision D-1641 (which sets water quality objectives for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary) to operate—

(A) to a ratio using a 3-day averaging period on the rising limb of a Delta inflow hydrograph; and

(B) to a 14-day averaging period on the falling limb of the Delta inflow hydrograph.

(c) Other Agencies.—To the extent that a Federal department or agency other than the Department of the Interior or the Department of Commerce has a role in approving a project described in subsection (a) or (b), this section shall apply to the Federal department or agency.

(d) Accelerated Project Decision and Elevation.—

(1) IN GENERAL.—On request of the Governor of California, the Secretaries of the Interior and Commerce shall use the expedited procedures under this subsection to make final decisions relating to Federal or federally approved projects or operational changes proposed pursuant to subsections (a) and (b) to provide additional water supplies or otherwise address emergency drought conditions.

(2) REQUEST FOR RESOLUTION.—

(A) IN GENERAL.—On request of the Governor of California, the Secretaries of the Interior and Commerce or the head of another Federal department or agency responsible for carrying out a review of a project, as applicable, shall convene a final project decision meeting with the heads of all relevant Federal agencies to decide whether to approve a project to provide emergency water supplies or otherwise address emergency

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1 drought conditions.

2 (B) MEETING.—A meeting under subparagraph (A) shall
3 convene not later than 7 days after the date of receipt of the
4 meeting request.

5 (3) NOTIFICATION.—On receipt of a request for a meeting under
6 this subsection, the Secretary of the Interior shall notify the heads of
7 all relevant Federal departments and agencies of the request,
8 including a description of—

9 (A) the project to be reviewed; and

10 (B) the date for the meeting.

11 (4) DECISION.—Not later than 10 days after the date on which a
12 meeting is requested under paragraph (2), the head of the relevant
13 Federal agency shall issue a final decision on the project.

14 (5) MEETING CONVENED BY SECRETARY.—The Secretary of the
15 Interior may convene a final project decision meeting under this
16 subsection at any time, at the discretion of the Secretary, regardless
17 of whether a meeting is requested under paragraph (2).

18 (6) LIMITATION.—The expedited procedures under this subsection
19 apply only—

20 (A) to proposed new Federal projects or operational changes
21 pursuant to subsection (a) or (b); and

22 (B) to the extent the procedures are consistent with applicable
23 laws (including regulations).

24 (e) Drought Plan.—For any year during which this section is in effect,
25 the Secretaries of the Interior and Commerce, in consultation with
26 appropriate State officials, shall develop a drought operations plan that is
27 consistent with this Act and other applicable Federal and State laws,
28 including provisions intended to provide additional water supplies that
29 could be of assistance during the drought in existence on the date of
30 enactment of this Act.

31 SEC. 303. TEMPORARY OPERATIONAL 32 FLEXIBILITY TO CAPTURE PEAK FLOWS 33 FROM WINTER STORMS.

34 (a) Environmental Protection Mandate.—The Secretaries of the Interior
35 and Commerce shall take no action pursuant to this Act that would cause
36 additional adverse effects on the listed fish species beyond the range of
37 effects anticipated to occur to the listed fish species for the duration of the
38 applicable biological opinion, using the best scientific and commercial
39 data available.

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(b) Real-time Management to Achieve Multiple Goals.—Pursuant to the adaptive management provisions of the smelt biological opinion and the salmonid biological opinion, the Secretaries of the Interior and Commerce shall monitor in real time to determine the location and densities of listed fish species relative to the pumps and Delta conditions, in order to identify more accurately and precisely—

(1) opportunities to increase water pumping without violating the standard in subsection (a) or other environmental laws and regulations; and

(2) circumstances where it is necessary to decrease water pumping to protect listed fish species.

(c) Requirement.—When consistent with the environmental protection mandate in subsection (a) and other environmental protections under subsection (e), the Secretaries of the Interior and Commerce, through the drought contingency plans, shall evaluate and may authorize the Central Valley Project and the State Water Project, combined, to operate at levels that result in daily average OMR flows more negative than -5,000 cubic feet per second (based on United States Geological Survey gauges on OMR) to capture peak flows during storm-related events, in accordance with subsections (d), (e), and (f).

(d) Factors to Be Considered.—In determining additional adverse effects on any listed fish species beyond the range of effects anticipated to occur to the listed fish species for the duration of the smelt biological opinion or salmonid biological opinion, using the best scientific and commercial data available, the Secretaries of the Interior and Commerce may consider the following factors:

(1) The real-time distribution of listed species.

(2) Relevant physical parameters including projected inflows, turbidity, salinities, and tidal cycles.

(3) Any other factor under the relevant biological opinion.

(e) Other Environmental Protections.—

(1) STATE LAW.—The actions of the Secretaries of the Interior and Commerce pursuant to this section shall be consistent with applicable regulatory requirements under State law.

(2) FIRST SEDIMENT FLUSH.—During the first flush of sediment out of the Delta during each water year, subject to the condition that the determination is based on objective evidence, OMR flow may be pursuant to the salmonid biological opinion and Action 1 of Reasonable and Prudent Alternative Component 1 in the smelt biological opinion at rates less negative than -5,000 cubic feet per second for the shortest time period necessary to avoid movement of adult Delta smelt to areas in the southern Delta that would be likely

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to increase entrainment at Central Valley Project or State Water
Project pumping plants.

(3) APPLICABILITY.—

(A) IN GENERAL.—This section on capturing peak flows from
winter storms shall not affect the application of the salmonid
biological opinion during the period beginning on April 1 and
ending on May 31, unless the Secretary of Commerce
determines that this section can be applied during part or all of
that time period to provide emergency water supply relief
without resulting in additional adverse effects beyond those
anticipated to occur for the duration the salmonid biological
opinion.

(B) THROUGH-DELTA WATER TRANSFERS.—In addition to any
other actions to benefit water supply, the Secretaries of the
Interior and Commerce shall consider allowing through-Delta
water transfers to occur during the period referred to in
subparagraph (A), in accordance with section 302(b)(8).

(C) CVPIA.—A water transfer solely or exclusively through
the State Water Project shall not be required to be consistent
with section 3405(a)(1)(H) of the Central Valley Project
Improvement Act (Public Law 102–575; 106 Stat. 4711).

(4) MONITORING.—In implementing this section, the
Commissioner, in coordination with the Director, the Assistant
Administrator, and the California Department of Fish and Wildlife,
shall carry out a monitoring program and other data gathering
activities—

(A) to ensure incidental take levels are not exceeded; and

(B) to identify potential negative impacts, if any.

(f) Effect of High Outflows.—When exercising their authorities
pursuant to drought contingency plans to capture peak flows pursuant to
subsection (c), the Secretaries of the Interior and Commerce shall not
count any day during that period toward the 5-day or 14-day running
averages of tidally filtered daily OMR flow requirements under the smelt
biological opinion or the salmonid biological opinion unless doing so is
required to avoid additional adverse effects on listed fish species beyond
the range of effects anticipated to occur to the listed fish species for the
duration of the biological opinions, using the best scientific and
commercial data available.

SEC. 304. EMERGENCY ENVIRONMENTAL REVIEWS.

To minimize the time spent carrying out environmental reviews and

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quickly to deliver water that is needed to address emergency drought conditions in the State of California, the head of each applicable Federal department or agency shall, in carrying out this title, consult with the Council on Environmental Quality in accordance with section 1506.11 of title 40, Code of Federal Regulations (or successor regulations), to develop alternative arrangements to comply with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) during the emergency.

SEC. 305. LEVEL OF DETAIL REQUIRED FOR ANALYSIS.

In articulating the determinations and demonstrations required under this title, the Secretaries of the Interior and Commerce shall—

(1) fully satisfy the requirements of this title using such quantity of written supporting detail as is reasonable within the timeframe permitted for timely decisionmaking in response to changing conditions in the Delta; and

(2) make the decision document available on a publicly accessible Internet website.

TITLE IV—WATER RIGHTS

SEC. 401. OFFSET FOR STATE WATER PROJECT.

(a) Implementation Impacts.—The Secretary of the Interior shall confer with the California Department of Fish and Wildlife in connection with the implementation of this Act regarding potential impacts to any consistency determination for operations of the State Water Project issued pursuant to section 2080.1 of the California Fish and Game Code.

(b) Additional Yield.—If, as a result of the application of this Act, the California Department of Fish and Wildlife—

(1) determines that operations of the State Water Project are inconsistent with the consistency determinations issued pursuant to California Fish and Game Code section 2080.1 for operations of the State Water Project; or

(2) requires take authorization under California Fish and Game Code section 2081 for operation of the State Water Project,

in a manner that directly or indirectly results in reduced water supply to the State Water Project as compared with the water supply available under the smelt biological opinion and the salmonid biological opinion, and as a result, Central Valley Project yield is greater than it otherwise would have been, then that additional yield shall be made available to the State Water Project for delivery to State Water Project contractors to offset the reduced

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water supply, provided that if it is necessary to reduce water supplies for any Central Valley Project authorized uses or contractors to make available to the State Water Project that additional yield, such reductions shall be applied to those uses or contractors that benefit from that increased yield.

(c) Notification Related to Environmental Protections.—The Secretaries of the Interior and Commerce shall—

(1) notify the Director of the California Department of Fish and Wildlife regarding any changes in the manner in which the smelt biological opinion or the salmonid biological opinion is implemented; and

(2) confirm that those changes are consistent with the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

(d) Savings.—Nothing in this section shall have any effect on the application of the California Endangered Species Act (California Fish and Game Code sections 2050 through 2116).

SEC. 402. AREA OF ORIGIN AND WATER RIGHTS PROTECTIONS.

(a) In General.—In carrying out this Act, the Secretaries of the Interior and Commerce shall not take any action that—

(1) diminishes, impairs, or otherwise affects in any manner any area of origin, watershed of origin, county of origin, or any other water rights protection, including rights to water appropriated before December 19, 1914, provided under California law;

(2) limits, expands, or otherwise affects the application of section 10505, 10505.5, 11128, 11460, 11461, 11462, 11463, or 12200 through 12220 of the California Water Code or any other provision of California water rights law, without respect to whether such a provision is specifically referred to in this Act; or

(3) diminishes, impairs, or otherwise affects in any manner any water rights or water rights priorities under applicable law.

(b) Effect of Act.—Nothing in this Act—

(1) affects or modifies any obligation of the Secretary of the Interior under section 8 of the Act of June 17, 1902 (32 Stat. 390, chapter 1093); or

(2) diminishes, impairs, or otherwise affects in any manner any project purposes or priorities for the allocation, delivery, or use of water under applicable law, including the project purposes and priorities established under sections 3402 and section 3406 of the Central Valley Project Improvement Act (Public Law 102–575; 106

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1 Stat. 4706).

2 SEC. 403. NO REDIRECTED ADVERSE 3 IMPACTS.

4 (a) Applicability.—

5 (1) IN GENERAL.—The Secretaries of the Interior and Commerce
6 shall not carry out any specific action pursuant to this Act that will
7 directly or, through State agency action, indirectly result in the
8 involuntary reduction of water supply to an individual, district, or
9 agency that has in effect a contract for water with the State Water
10 Project or the Central Valley Project, including settlement and
11 exchange contracts, refuge contracts, and Friant Division contracts,
12 as compared to the water supply that would be provided in the
13 absence of action under this Act.

14 (2) EFFECT OF ACT.—Nothing in this Act modifies, amends, or
15 affects any right or obligation of any party to a contract described in
16 paragraph (1).

17 (b) Action on Determination.—If, after exploring all options, the
18 Secretary makes a final determination that a proposed action under this
19 Act cannot be carried out in accordance with subsection (a), the
20 Secretary—

21 (1) shall document that determination in writing with regard to that
22 action, including a statement of the facts relied on, and an
23 explanation of the basis, for the decision; and

24 (2) is subject to applicable law, including the Endangered Species
25 Act of 1973 (16 U.S.C. 1531 et seq.).

26 SEC. 404. ALLOCATIONS FOR 27 SACRAMENTO VALLEY WATER SERVICE 28 CONTRACTORS.

29 (a) Definitions.—In this section:

30 (1) EXISTING CENTRAL VALLEY PROJECT AGRICULTURAL WATER
31 SERVICE CONTRACTOR WITHIN SACRAMENTO RIVER WATERSHED.—
32 The term “existing Central Valley Project agricultural water service
33 contractor within the Sacramento River Watershed” means any water
34 service contractor within the Shasta, Trinity, or Sacramento River
35 Division of the Central Valley Project that has in effect a water
36 service contract on the date of enactment of this Act that provides
37 water for irrigation.

38 (2) YEAR TERMS.—The terms “Above Normal”, “Below Normal”,
39 “Dry”, and “Wet”, with respect to a year, have the meanings given

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1 those terms in the Sacramento Valley Water Year Type (40–30–30)
2 Index.

3 (b) Allocations of Water.—

4 (1) ALLOCATIONS.—Subject to subsection (c), the Secretary of the
5 Interior shall make every reasonable effort in the operation of the
6 Central Valley Project to allocate water provided for irrigation
7 purposes to each existing Central Valley Project agricultural water
8 service contractor within the Sacramento River Watershed in
9 accordance with the following:

10 (A) Not less than 100 percent of the contract quantity shall be
11 allocated to the Central Valley Project agricultural water service
12 contractor within the Sacramento River Watershed in a Wet
13 year.

14 (B) Not less than 100 percent of the contract quantity shall be
15 allocated to the Central Valley Project agricultural water service
16 contractor within the Sacramento River Watershed in an Above
17 Normal year.

18 (C) Not less than 100 percent of the contract quantity shall be
19 allocated to the Central Valley Project agricultural water service
20 contractor within the Sacramento River Watershed in a Below
21 Normal year that is preceded by an Above Normal or Wet year.

22 (D) Not less than 50 percent of the contract quantity shall be
23 allocated to the existing Central Valley Project agricultural
24 water service contractor within the Sacramento River Watershed
25 in a Dry year that is preceded by a Below Normal, Above
26 Normal, or Wet year.

27 (E) Subject to paragraph (2), in any other year not identified
28 in any of subparagraphs (A) through (D), the Secretary shall
29 allocate not less than twice the allocation percentage to south-of-
30 Delta Central Valley Project agricultural water service
31 contractors, up to 100 percent.

32 (2) EFFECT OF SUBPARAGRAPH.—In the event of anomalous
33 circumstances, nothing in paragraph (1)(E) precludes an allocation to
34 an existing Central Valley Project agricultural water service
35 contractor within the Sacramento River Watershed that is greater than
36 twice the allocation percentage to a south-of-Delta Central Valley
37 Project agricultural water service contractor.

38 (c) Protection of Environment, Municipal, and Industrial Supplies and
39 Other Contractors.—

40 (1) ENVIRONMENT.—Nothing in subsection (b) shall adversely
41 affect any protections for the environment, including—

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- 1 (A) the cold water pool behind Shasta Dam or any other
2 Central Valley Project reservoir;
- 3 (B) the obligation of the Secretary of the Interior to make
4 water available to managed wetlands pursuant to section 3406(d)
5 of the Central Valley Project Improvement Act (Public Law
6 102–575; 106 Stat. 4722); or
- 7 (C) any obligation—
- 8 (i) of the Secretaries of the Interior and Commerce under
9 the smelt biological opinion, the salmonid biological
10 opinion, or any other applicable biological opinion; or
- 11 (ii) under the Endangered Species Act of 1973 (16
12 U.S.C. 1531 et seq.), the Central Valley Project
13 Improvement Act (Public Law 102–575; 106 Stat. 4706), or
14 any other applicable law (including regulations).
- 15 (2) MUNICIPAL AND INDUSTRIAL SUPPLIES.—Nothing in subsection
16 (b)—
- 17 (A) modifies any provision of a water service contract that
18 addresses municipal or industrial water shortage policies of the
19 Secretaries of the Interior and Commerce;
- 20 (B) affects or limits the authority of the Secretaries of the
21 Interior and Commerce—
- 22 (i) to adopt or modify municipal and industrial water
23 shortage policies; or
- 24 (ii) to implement a municipal or industrial water shortage
25 policy;
- 26 (C) constrains, governs, or affects, directly or indirectly, the
27 operations of the American River Division of the Central Valley
28 Project or any deliveries from that Division or a unit or facility
29 of that Division; or
- 30 (D) affects any allocation to a Central Valley Project
31 municipal or industrial water service contractor by increasing or
32 decreasing allocations to the contractor, as compared to the
33 allocation the contractor would have received absent subsection
34 (b).
- 35 (3) OTHER CONTRACTORS.—Nothing in subsection (b)—
- 36 (A) affects the priority of any individual or entity with a
37 Sacramento River settlement contract over water service or
38 repayment contractors;
- 39 (B) affects the obligation of the United States to make a
40 substitute supply of water available to the San Joaquin River

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exchange contractors;

(C) affects the allocation of water to Friant Division contractors of the Central Valley Project;

(D) results in the involuntary reduction in contract water allocations to individuals or entities with contracts to receive water from the Friant Division; or

(E) authorizes any actions inconsistent with State water rights law.

TITLE V—MISCELLANEOUS PROVISIONS

SEC. 501. AUTHORIZED SERVICE AREA.

(a) In General.—The service area of the Central Valley Project, as authorized by the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4706), shall include the area within the boundaries of the Kettleman City Community Services District of California, as in existence on the date of enactment of this Act.

(b) Long-term Contract.—

(1) IN GENERAL.—Notwithstanding the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4706) and subject to paragraph (2), the Secretary of the Interior, in accordance with the reclamation laws, shall enter into a long-term contract with the Kettleman City Community Services District of California, under terms and conditions mutually agreeable to the parties, for the delivery of up to 900 acre-feet of Central Valley Project water for municipal and industrial use.

(2) LIMITATION.—A Central Valley Project water delivery under the contract entered into under paragraph (1) shall be limited to the minimal quantity necessary to meet the immediate needs of the Kettleman City Community Services District, in the event that local supplies or State Water Project allocations are insufficient to meet those needs.

(c) Permit.—The Secretary shall apply to the State of California for a permit for a joint place of use for water deliveries under the contract entered into under subsection (b) with respect to the expanded service area under subsection (a), in accordance with State law.

(d) Additional Costs.—The applicable non-Federal entity shall pay the costs of any additional infrastructure, water treatment, or related costs are needed to carry out this section.

SEC. 502. OVERSIGHT OVER AND PUBLIC INPUT INTO RESTORATION FUND

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ACTIVITIES.

Section 3407 of the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4726) is amended by striking subsection (f) and inserting the following:

“(f) Restoration Fund Financial Reports.—

“(1) TRANSPARENCY IN EXPENDITURES.—For the effective period of the California Emergency Drought Relief Act, the Secretary shall make available, on a publicly accessible Internet website, a report describing a detailed work plan for the expenditure of all amounts deposited in the Restoration Fund during the preceding fiscal year, including—

“(A) a description of all receipts to, and uses of, funds deposited in the Restoration Fund and the Restoration Account during the preceding fiscal year;

“(B) a projection of the expected receipts to the Restoration Fund and Restoration Account for the following fiscal year; and

“(C) an analysis of the effectiveness of each expenditure included in the report covering the preceding fiscal year.

“(2) PUBLIC PARTICIPATION FOR PLANNED EXPENDITURES.—

“(A) IN GENERAL.—For each fiscal year, the Secretary shall make available on a publicly accessible Internet website a proposed draft work plan for the following fiscal year regarding priorities and spending levels for projects and programs to be carried out under this title.

“(B) PUBLIC COMMENT.—The draft work plan under this paragraph shall be made available for public comment for a period not less than 30 days.”.

SEC. 503. BASIN STUDIES.

(a) In General.—The Secretary of the Interior shall—

(1) expand opportunities and expedite completion of assessments under the Secure Water Act (section 9503(b) of Public Law 111–11 (42 U.S.C. 10363(b)), together with non-Federal partners, of individual sub-basins and watersheds within major Reclamation river basins; and

(2) ensure prompt decisionmaking regarding, and expedited implementation of, adaptation and mitigation strategies developed through the special study process.

(b) Contributed Funds.—The Secretary may accept and use contributions of funds from the non-Federal partners to carry out activities

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under the special studies consistent with the administration of basin studies program criteria.

SEC. 504. TECHNICAL AND MODELING ASSISTANCE.

(a) In General.—The Secretaries of the Interior and Commerce may provide technical and modeling assistance on request to the State Water Resources Control Board during the drought emergency in effect on the date of enactment of this Act.

(b) Data Availability.—The Secretaries of the Interior and Commerce shall make publicly available on request any modeling and data provided under subsection (a).

SEC. 505. REPORT ON RESULTS OF WATER USAGE.

The Secretary of the Interior, in consultation with the Secretary of Commerce and the Secretary of Natural Resources of the State of California, shall publish an annual report describing, with respect to the period covered by the report—

(1) instream flow releases from the Central Valley Project and State Water Project;

(2) the explicit purpose and authority of those releases; and

(3) all measured environmental benefits as a result of the releases.

SEC. 506. ADDITIONAL STORAGE AT NEW MELONES.

(a) Coordination.—The Commissioner shall coordinate with local water and irrigation districts in the Stanislaus River Basin to identify the quantity of water storage made available by the draft plan of operations in New Melones Reservoir (referred to in this section as the “draft plan”) for—

(1) water conservation programs;

(2) conjunctive use projects;

(3) water transfers;

(4) rescheduled project water; and

(5) other projects to maximize water storage and ensure the beneficial use of the water resources in the Stanislaus River Basin.

(b) Requirement.—The programs and projects described in subsection (a) shall be implemented in accordance with applicable laws (including

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regulations).

(c) Source of Water.—The source of water for any storage program carried out under this section at New Melones Reservoir shall be made available under a valid water right, in accordance with—

(1) the water transfer guidelines of the State of California; and

(2) any other applicable State water law.

(d) Report.—Not later than 18 months after the date of identification of the quantity of storage made available under the draft plan that has been allocated under this section, the Commissioner shall submit to Congress a report describing the implementation of this section, including proposals received by the Commissioner from interested parties for purposes of this section.

SEC. 507. CONTRACTING AUTHORITIES.

(a) Delta Research Station Leases.—Notwithstanding section 585 of title 40, United States Code, the Secretaries of the Interior and Commerce may enter directly into any lease of real property for the Delta Research Station.

(b) Collaborative Processes.—Notwithstanding the Federal Advisory Committee Act (5 U.S.C. App.) and applicable Federal acquisitions and contracting authorities, the Secretaries of the Interior and Commerce may use the collaborative processes under the Collaborative Science Adaptive Management Program to enter into contracts with specific individuals or organizations directly or in conjunction with appropriate State agencies.

SEC. 508. SINGLE ANNUAL REPORT.

To the maximum extent practicable, the Secretary of the Interior shall combine into 1 report the annual reports required to be submitted under this Act to the Committees on Appropriations and Energy and Natural Resources of the Senate and the Committees on Appropriations and Natural Resources of the House of Representatives.

TITLE VI—OFFSETS

SEC. 601. DEAUTHORIZATION OF INACTIVE PROJECTS.

(a) Purposes; Definitions.—

(1) PURPOSES.—The purposes of this section are—

(A) to identify Bureau of Reclamation projects and programs that are no longer feasible due to—

(i) a lack of local support;

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1 (ii) a lack of available Federal or non-Federal resources;
2 or

3 (iii) an authorized purpose that is no longer relevant or
4 feasible;

5 (B) to establish an efficient and transparent process for
6 deauthorizing Reclamation projects and programs that have
7 failed to receive a minimum level of investment to ensure active
8 projects can move forward while reducing the backlog of
9 authorized projects;

10 (C) to create an expedited and definitive process to
11 deauthorize Reclamation projects and programs;

12 (D) to allow the continued authorization of programs and
13 projects that are feasible; and

14 (E) to establish a process for identifying authorized
15 Reclamation projects and programs that are no longer—

16 (i) in the Federal interest; or

17 (ii) feasible.

18 (2) DEFINITIONS.—In this section:

19 (A) RECLAMATION PROJECT OR PROGRAM.—The term
20 “Reclamation project or program” includes any project or
21 program that is administered by the Bureau of Reclamation.

22 (B) SECRETARY.—The term “Secretary” means the Secretary
23 of the Interior.

24 (b) Comprehensive Reports.—

25 (1) MINIMUM FUNDING LIST.—Not later than 180 days after the
26 date of enactment of this Act, the Secretary shall submit to the
27 Committee on Energy and Natural Resources of the Senate and the
28 Committee on Natural Resources of the House of Representatives,
29 and make available on a publicly accessible Internet website in a
30 manner that is downloadable, searchable, and sortable, a list of—

31 (A) Reclamation programs authorized, and for which funding
32 was obligated, during the current fiscal year or any of the
33 preceding 5 fiscal years; and

34 (B)(i) Reclamation projects or separable elements of projects
35 authorized for construction for which funding has been obligated
36 during the current fiscal year or any of the 5 preceding fiscal
37 years;

38 (ii) the amount of funding obligated for each such project or
39 separable element per fiscal year;

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- 1 (iii) the current phase of each such project or separable
2 element; and
- 3 (iv) the amount required to complete the current phase of each
4 such project or separable element.
- 5 (2) BACKLOG REPORT.—Together with the report under paragraph
6 (1), the Secretary shall submit to the Committee on Energy and
7 Natural Resources of the Senate and the Committee on Natural
8 Resources of the House of Representatives, and make available on a
9 publicly accessible Internet website in a manner that is downloadable,
10 searchable, and sortable, a list of—
- 11 (A) Reclamation programs that are authorized and for which
12 funding was not obligated during the current fiscal year or any
13 of the preceding 5 fiscal years; and
- 14 (B)(i) projects or separable elements that are authorized for
15 construction but have not been completed;
- 16 (ii) the date of authorization of the project or separable
17 element, including any subsequent modifications to the original
18 authorization;
- 19 (iii) the original budget authority for the project or separable
20 element;
- 21 (iv) a brief description of the project or separable element;
- 22 (v) the estimated date of completion of the project or
23 separable element;
- 24 (vi) the estimated cost of completion of the project or
25 separable element; and
- 26 (vii) any amounts appropriated for the project or separable
27 element that remain unobligated.
- 28 (c) Interim Deauthorization List.—
- 29 (1) IN GENERAL.—The Secretary shall develop an interim
30 deauthorization list that identifies each authorized Reclamation
31 program or project, or separable element of a Reclamation program
32 or project, for which Federal or non-Federal funds were not obligated
33 for construction during—
- 34 (A) the applicable fiscal year; or
- 35 (B) any of the 5 preceding fiscal years.
- 36 (2) SPECIAL RULE FOR PROJECTS RECEIVING FUNDS FOR POST-
37 AUTHORIZATION STUDY.—A Reclamation project or separable
38 element of a Reclamation project may not be identified on the interim
39 deauthorization list, or on the final deauthorization list under
40 subsection (d), if the Reclamation project or separable element

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1 received funding for a post-authorization study during—

2 (A) the applicable fiscal year; or

3 (B) any of the 5 preceding fiscal years.

4 (3) PUBLIC COMMENT AND CONSULTATION.—

5 (A) IN GENERAL.—The Secretary shall solicit comments from
6 the public and the Governors of each applicable State regarding
7 the interim deauthorization list developed under paragraph (1).

8 (B) COMMENT PERIOD.—The public comment period under
9 subparagraph (A) shall be 90 days.

10 (4) SUBMISSION TO CONGRESS; PUBLICATION.—Not later than 90
11 days after the date of submission of the list required under subsection
12 (b), the Secretary shall—

13 (A) submit the interim deauthorization list to the Committee
14 on Energy and Natural Resources of the Senate and the
15 Committee on Natural Resources of the House of
16 Representatives; and

17 (B) publish the interim deauthorization list in the Federal
18 Register.

19 (d) Final Deauthorization List.—

20 (1) IN GENERAL.—The Secretary shall develop a final
21 deauthorization list of each Reclamation program or project, or
22 separable element of a Reclamation program or project, described in
23 subsection (c)(1) that is identified pursuant to this subsection.

24 (2) IDENTIFICATION OF PROJECTS.—

25 (A) SEQUENCING.—

26 (i) IN GENERAL.—The Secretary shall identify
27 Reclamation projects and separable elements of
28 Reclamation projects for inclusion on the final
29 deauthorization list according to the order in which the
30 Reclamation projects and separable elements were
31 authorized, beginning with the earliest-authorized
32 Reclamation projects and separable elements.

33 (ii) FACTORS FOR CONSIDERATION.—The Secretary may
34 identify a Reclamation program, project, or separable
35 element of a Reclamation program or project for exclusion
36 from the final deauthorization list if the Secretary
37 determines, on a case-by-case basis, that the Reclamation
38 program, project, or separable element is critical for
39 interests of the United States, based on the possible impact
40 of the Reclamation program, project, or separable element

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1 on—

2 (I) public health and safety;

3 (II) the national economy; or

4 (III) the environment.

5 (iii) CONSIDERATION OF PUBLIC COMMENTS.—In making
6 a determination under clause (i) or (ii), the Secretary shall
7 take into consideration any comments received under
8 subsection (c)(3).

9 (B) APPENDIX.—The Secretary shall include as part of the
10 final deauthorization list an appendix that—

11 (i) identifies each Reclamation program, project, and
12 separable element of a Reclamation program or project on
13 the interim deauthorization list developed under subsection
14 (c) that is not included on the final deauthorization list; and

15 (ii) describes the reasons why the Reclamation program,
16 project, or separable element is not included.

17 (3) SUBMISSION TO CONGRESS; PUBLICATION.—Not later than 120
18 days after the date of expiration of the public comment period under
19 subsection (c)(3), the Secretary shall—

20 (A) submit the final deauthorization list and the appendix
21 under paragraph (2)(B) to the Committee on Energy and Natural
22 Resources of the Senate and the Committee on Natural
23 Resources of the House of Representatives; and

24 (B) publish the final deauthorization list and the appendix in
25 the Federal Register.

26 (e) Deauthorization; Congressional Review.—

27 (1) IN GENERAL.—Subject to paragraph (2), effective beginning on
28 the date that is 180 days after the date of submission of the final
29 deauthorization list under subsection (d), a Reclamation program,
30 project, or separable element of a Reclamation program or project
31 included on the list is deauthorized, unless Congress passes a joint
32 resolution disapproving the final deauthorization report before that
33 date.

34 (2) NON-FEDERAL CONTRIBUTIONS.—A Reclamation program,
35 project, or separable element included on the final deauthorization list
36 under subsection (d) shall not be deauthorized under this subsection
37 if, before the expiration of the 180-day period referred to in
38 paragraph (1), the non-Federal interest of the Reclamation program,
39 project, or separable element provides sufficient funds to complete
40 the Reclamation program, project, or separable element.

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(f) Treatment of Project Modifications.—For purposes of this section, if an authorized water resources development Reclamation program, project, or separable element of the program or project has been modified by an Act of Congress, the date of authorization of the Reclamation program, project, or separable element shall be deemed to be the date of the most recent modification.

(g) Exemption.—Any Reclamation project that would yield an average of more than 200,000 acre-feet of water per year shall be exempt from this subsection.

SEC. 602. ACCELERATED REVENUE, REPAYMENT, AND SURFACE WATER STORAGE ENHANCEMENT.

(a) Short Title.—This section may be cited as the “Accelerated Revenue, Repayment, and Surface Water Storage Enhancement Act”.

(b) Definitions.—In this section:

(1) ACCOUNT.—The term “Account” means the Reclamation Surface Water Storage Account established under subsection (f)(1).

(2) CONSTRUCTION.—

(A) IN GENERAL.—The term “construction” means the designing, materials engineering and testing, surveying, and building of surface water storage.

(B) INCLUSIONS.—The term “construction” includes—

(i) any addition to existing surface water storage; and

(ii) construction of a new surface water storage facility.

(C) EXCLUSIONS.—The term “construction” excludes any Federal statutory or regulatory obligation relating to any permit, review, approval, or other similar requirement.

(3) SECRETARY.—The term “Secretary” means the Secretary of the Interior.

(4) SURFACE WATER STORAGE.—The term “surface water storage” means storage at—

(A) any federally owned facility under the jurisdiction of the Bureau of Reclamation; or

(B) any non-Federal facility used for the surface storage and supply of water resources.

(5) TREASURY RATE.—The term “Treasury rate” means the 20-year constant maturity treasury rate published by the United States Treasury, as in existence on the effective date of the applicable

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1 contract.

2 (6) WATER USERS ASSOCIATION.—

3 (A) IN GENERAL.—The term “water users association” means
4 an entity organized and recognized under State law that is
5 eligible to enter into contracts with the Commissioner—

6 (i) to receive contract water for delivery to users of the
7 water; and

8 (ii) to pay any applicable charges.

9 (B) INCLUSIONS.—The term “water users association”
10 includes—

11 (i) an association;

12 (ii) a conservatory district;

13 (iii) an irrigation district;

14 (iv) a municipality; and

15 (v) a water project contract unit.

16 (c) Conversion and Prepayment of Contracts.—

17 (1) CONVERSION.—

18 (A) IN GENERAL.—On receipt of a request from a water users
19 association, the Secretary shall convert any water service
20 contract in effect on the date of enactment of this Act between
21 the United States and the water users association to allow for
22 prepayment of the repayment contract in accordance with this
23 paragraph under mutually agreeable terms and conditions.

24 (B) MANNER.—The manner of conversion under this
25 paragraph shall be as follows:

26 (i) Water service contracts entered under section 9(c)(2)
27 of the Act of August 4, 1939 (53 Stat. 1194, chapter 418),
28 to be converted under this section shall be converted to a
29 contract under section 9(c)(1) of that Act (53 Stat. 1194,
30 chapter 418).

31 (ii) Water service contracts entered into under section
32 9(e) of the Act of August 4, 1939 (53 Stat. 1196, chapter
33 418), to be converted under this section shall be converted
34 to repayment contracts under section 9(d) of that Act (53
35 Stat. 1195, chapter 418).

36 (2) PREPAYMENT.—

37 (A) SECTION 9(C)(1).—Except for a repayment contract under
38 which the applicable water users association has previously

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1 negotiated for prepayment, each repayment contract under
2 section 9(c)(1) of the Act of August 4, 1939 (53 Stat. 1194,
3 chapter 418) (including any contract converted pursuant to
4 paragraph (1)(B)(i)), in effect on the date of enactment of this
5 Act shall, at the request of the water users association—

6 (i) provide for the repayment in lump sum of the
7 remaining construction costs identified in an applicable
8 water project-specific municipal or industrial rate
9 repayment schedule (as adjusted to reflect payment not
10 reflected in the schedule) and properly assignable for
11 ultimate return by the water users association, subject to the
12 condition that an estimate of the remaining construction
13 costs, as adjusted, shall be provided by the Secretary to the
14 water users association by not later than 90 days after the
15 date of receipt of the request of the water users association;

16 (ii) require that any construction costs or other
17 capitalized costs that were incurred after the effective date
18 of the contract, were not reflected in the rate schedule
19 referred to in clause (i), or were not properly assignable to
20 the water users association, and were incurred as a result of
21 a collective annual allocation of capital costs to the water
22 users association electing contract conversion under this
23 subsection, shall be repaid—

24 (I) for costs equal to less than \$5,000,000, by not
25 later than the date that is 5 years after the date of
26 notification of the allocation; or

27 (II) for costs equal to \$5,000,000 or more, in
28 accordance with applicable reclamation laws; and

29 (iii) continue in effect for the period during which the
30 water users association pays applicable charges in
31 accordance with section 9(c)(1) of the Act of August 4,
32 1939 (53 Stat. 1194, chapter 418), and other applicable law.

33 (B) SECTION 9(D).—Except for a repayment contract under
34 which the applicable water users association has previously
35 negotiated for prepayment, each repayment contract under
36 section 9(d) of the Act of August 4, 1939 (53 Stat. 1195, chapter
37 418) (including any contract converted pursuant to paragraph
38 (1)(B)(ii)), in effect on the date of enactment of this Act shall, at
39 the request of the water users association—

40 (i) provide for repayment of the remaining construction
41 costs identified in an applicable water project-specific
42 irrigation rate repayment schedule (as adjusted to reflect
43 payment not reflected in the schedule) and properly

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assignable for ultimate return by the water users association in lump sum, by accelerated prepayment, or if made in approximately equal installments, by not later than 3 years after the effective date of the repayment contract, subject to the conditions that—

(I) the amount shall be discounted by $\frac{1}{2}$ the Treasury rate; and

(II) the estimate of the remaining construction costs, as adjusted, shall be provided by the Secretary to the water users association by not later than 90 days after the date of receipt of the request of the water users association;

(ii) require that any construction costs or other capitalized costs that were incurred after the effective date of the contract, were not reflected in the rate schedule referred to in clause (i), or were not properly assignable to the water users association, and were incurred as a result of a collective annual allocation of capital costs to the water users association electing contract conversion under this subsection, shall be repaid—

(I) for costs equal to less than \$5,000,000, by not later than the date that is 5 years after the date of notification of the allocation; or

(II) for costs equal to \$5,000,000 or more, in accordance with applicable reclamation laws;

(iii) provide that power revenues will not be available to aid in repayment of construction costs allocated to irrigation under the contract; and

(iv) continue in effect for the period during which the water users association pays applicable charges in accordance with section 9(d) of the Act of August 4, 1939 (53 Stat. 1195, chapter 418), and other applicable law.

(3) TREATMENT.—A contract entered into pursuant to this subsection—

(A) shall not be adjusted on the basis of the type of prepayment financing used by the applicable water users association;

(B) shall conform to any other applicable agreement, such as a settlement agreement or a new constructed appurtenant facility agreement; and

(C) shall not modify any other—

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- 1 (i) water service, repayment, exchange, or transfer
2 contractual right between the water users association, and
3 the Bureau of Reclamation; or
- 4 (ii) right, obligation, or relationship of the water users
5 association and an applicable landowner in accordance with
6 State law.
- 7 (d) Accounting.—
- 8 (1) ADJUSTMENT.—The amounts paid pursuant to subsection (c)
9 shall be subject to adjustment following a final cost allocation by the
10 Secretary.
- 11 (2) DEFICIENCIES.—
- 12 (A) IN GENERAL.—If the final cost allocation under paragraph
13 (1) indicates that the costs properly assignable to a water users
14 association are greater than the costs paid by the water users
15 association, the water users association shall be obligated to pay
16 to the Secretary the remaining allocated costs under an
17 additional repayment contract under subparagraph (B).
- 18 (B) ADDITIONAL REPAYMENT CONTRACTS.—An additional
19 repayment contract required by subparagraph (A) shall—
- 20 (i) have a term of—
- 21 (I) not less than 1 year; and
- 22 (II) not more than 10 years; and
- 23 (ii) include such mutually agreeable provisions regarding
24 the rate of repayment of the deficient amount as may be
25 developed by the parties.
- 26 (3) OVERPAYMENTS.—If the final cost allocation under paragraph
27 (1) indicates that the costs properly assignable to a water users
28 association are less than the costs paid by the water users association,
29 the Secretary shall credit the amount of the overpayment as an offset
30 against any outstanding or future obligation of the water users
31 association.
- 32 (e) Applicability of Certain Provisions.—
- 33 (1) EFFECT OF EXISTING LAW.—On compliance by a water users
34 association with, and discharge of the obligation of repayment of the
35 construction costs pursuant to, a contract entered into under to
36 subsection (c)(2)(B), subsections (a) and (b) of section 213 of the
37 Reclamation Reform Act of 1982 (43 U.S.C. 390mm) shall apply to
38 any affected land.
- 39 (2) EFFECT OF OTHER OBLIGATIONS.—The obligation of a water
40 users association to repay any construction costs or other capitalized

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cost described in subparagraph (A)(ii) or (B)(ii) of subsection (c)(2), or subsection (d), shall not, on repayment, affect—

(A) the status of the water users association as having repaid all of the construction costs assignable to the water users association; or

(B) the applicability of subsection (a) or (b) of section 213 of the Reclamation Reform Act of 1982 (43 U.S.C. 390mm).

(f) Surface Water Storage Enhancement Program.—

(1) ESTABLISHMENT OF ACCOUNT.—The Secretary shall establish an account, to be known as the “Reclamation Surface Storage Account”, consisting of such amounts as are deposited in the Account under paragraph (2), to fund the construction of surface water storage.

(2) DEPOSITS.—Not later than 3 years after the date of enactment of this Act, an amount equal to 50 percent of receipts generated from the prepayment of contracts under this section in excess of amounts necessary to cover the amount of receipts forgone from scheduled payments under applicable law in effect on that date of enactment during the 10-year period beginning on that date of enactment shall be deposited in the Account.

(3) USE.—

(A) COOPERATIVE AGREEMENTS.—The Secretary may—

(i) enter into cooperative agreements with water users associations for the construction of surface water storage; and

(ii) use amounts in the Account to fund construction under such a cooperative agreement.

(B) TREATMENT.—A surface water storage project that is otherwise not federally authorized shall not be considered to be a Federal facility as a result of the allocation of any amount from the Account for any portion of the project.

(4) REPAYMENT.—Any amount from the Account used for surface water storage construction shall be fully reimbursed to the Account in accordance with applicable requirements under the reclamation laws, except that all funds reimbursed shall be deposited in the Account.

(5) AVAILABILITY OF AMOUNTS.—The amounts deposited in the Account under this subsection shall—

(A) be made available for the storage projects identified in section 402, subject to appropriation; and

(B) be in addition to amounts appropriated for those purposes

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1 under any other provision of law.

2 (6) PURPOSES OF SURFACE WATER STORAGE.—The construction of
3 surface water storage under this section shall be made available for
4 the federally owned and State-led storage projects pursued under this
5 Act, provided that funds are limited to the Federal cost-share (up to
6 25 percent for State-led projects and up to 50 percent for federally
7 owned projects).

8 (g) Effect of Section.—Nothing in this section—

9 (1) alters the repayment obligation of any water service or
10 repayment contractor receiving water from a water project, or shifts
11 any costs that would otherwise have been properly assignable to a
12 water users association described in subsection (c) or another
13 contractor, absent this section, including operation and maintenance
14 costs, construction costs, or other capitalized costs incurred after the
15 date of enactment of this Act; or

16 (2) alters any specific requirement for the disposition of amounts
17 received as repayments by the Secretary under the reclamation laws.

18 TITLE VII—DURATION AND EFFECT ON 19 EXISTING OBLIGATIONS

20 SEC. 701. SAVINGS CLAUSE.

21 (a) In General.—This Act shall not be interpreted or implemented in a
22 manner that—

23 (1) preempts or modifies any obligation of the United States to act
24 in conformance with applicable State law;

25 (2) affects or modifies any obligation under the Central Valley
26 Project Improvement Act (Public Law 102–575; 106 Stat. 4706),
27 except for the procedural provisions relating to public input and
28 savings provisions for the Stanislaus River predator management
29 program expressly established by sections 203 and 502; or

30 (3) overrides, modifies, or amends the applicability of the
31 Endangered Species Act of 1973 (16 U.S.C. 1531 et seq) or the
32 application of the smelt and salmonid biological opinions to the
33 operation of the Central Valley Project or the State Water Project.

34 (b) Sense of Congress.—It is the sense of Congress that there is no
35 conflict between this Act and the salmonid biological opinion, the smelt
36 biological opinion, the Endangered Species Act of 1973 (16 U.S.C. 1531
37 et seq.), and the Central Valley Project and State Water Project Drought
38 Contingency Plan of 2015.

39

DISCUSSION DRAFT

1 SEC. 702. TERMINATION.

2 All of title III (relating to California emergency drought relief and
3 operational flexibility), except for subsections (a) through (d) of section
4 301, and title IV (relating to water rights) shall expire on the date that is
5 the later of—

6 (1) the date on which the Governor of the State of California
7 declares an end to the State drought emergency; or

8 (2) two years after the date of enactment of this Act.
9

***California Long-Term Provisions for Water Supply
and Short-Term Provisions for Emergency
Drought Relief Act***

**Eight Water Supply Benefits from Short-Term
Operations**

1) Agencies must explain reductions in pumping below -5000 cfs, the high end of the Delta Smelt biological opinion:

- Like past drafts, agencies decide how much to pump under the smelt biological opinion. (*Section 301(e) on pages 60-62*)
- **If they pump below -5000 cfs, agencies must explain why this was necessary** to avoid “additional adverse effects on the listed fish species beyond the range of effects anticipated to occur to the listed fish species for the duration of the applicable biological opinion, using the best scientific and commercial data available”. (*Section 301(e)(4)(B)(ii) on page 61 lines 39 to page 62 line 12*)
- **This required explanation uses the same language as prior drafts.**

2) Maximize water supply consistent with environmental laws:

- During the drought, the agencies must maximize water supplies for the Central Valley Project and the State Water Project, consistent with applicable laws and regulations. (*Section 302(a)(1) on page 63, lines 18-28*)
- This requirement works together with the requirement that agencies must explain adverse effects that require a reduction in water supplies.

3) The Discussion Draft allows for increased pumping during winter storms.

- **Goal is to capture peak flows from El Niño winter storms.**

- **Agencies must evaluate increased pumping above -5000 cfs in the Old and Middle Rivers during those storms.** (*Section 303, pages 68-70, and in particular section 303(c) on page 69, lines 12-20*).

4) The Discussion Draft eliminates automatic “payback” of water supply gains:

- By eliminating this “payback” requirement, the agencies can keep the water they pump during winter storms.
- **Here is how “payback” works:**
 - **Over a 14 day period, agencies can’t average pumping at more than -5000 cfs** in Old and Middle Rivers.
 - In past years, this meant that if agencies pumped over -5000 cfs for a few days, they had to reduce pumping below -5000 cfs to meet the average.
 - As a result, **agencies had to lower pumping below -5000 cfs even if there was no environmental reason** to do so.
- **The Discussion Draft eliminates mandatory “payback”:**
 - Agencies can decide to pump at levels above -5000 cfs.
 - Agencies don’t have to reduce pumping later just to meet a 14-day average.
 - Thus there is no automatic payback requirement.
 - Pumping only needs to be reduced if environmental factors (like the presence of fish and salinity, among others) requires it.
- We worked closely with NOAA Fisheries on this language to ensure compliance with the ESA. (*Section 303(e), p. 70, lines 29-38*)

5) The Discussion Draft emphasizes real-time monitoring.

- **The Senate Bill requires agencies to operate the water system more precisely by doing the following:**
 - Operating pumps at higher levels when no fish are present and reducing pumping levels when fish are nearby. (*Section 301(b) to (d), pages 59-60*)
 - Requiring **daily boat monitoring to survey for smelt near the pumps** when turbidity levels are high, so that pumping reductions are made based on the facts. (*Section 301(b)(3), page 59, lines 22-35*)
 - Authorizing studies to **identify smelts' location in the Delta on a real-time basis**. (*Section 301(b)(1)-(2), page 59, lines 4-21*)
 - Authorizing a Delta Smelt Distribution Study to **identify how many smelt are in different parts of the Delta** in drier and wetter years. (*Section 301(d), page 60, lines 3-32*)

The Discussion Draft facilitates water transfers in two ways:

6) Incentivizes increased water transfers through the use of a 1:1 transfer ratio.

- Given this year's El Niño storms, this provision could provide some relief. Under a "1:1 ratio," if the river flows at 1,000 cubic feet per second, then water can be transferred at the same rate.
- Maintaining a 1:1 ratio for transfers through the spring and early summer will ensure that 100% of the water identified for a transfer goes to the communities that need it most. (*Section 302(b)(6) on page 64, line 40 to page 65, line 24*)

7) Extends the time period for transfers by five months.

- This extension will give willing sellers and willing buyers more time to move water, stretching supplies during the critical growing season.
- **How this provision works:** Transfers can now occur between April 1 and November 30 (currently July 1 to September 30), to the extent

consistent with the adaptive management part of the biological opinions.
(*Section 302(b)(8) on page 65, line 41 to page 66, line 7*)

8) The Discussion Draft directs the agencies to keep the Delta Cross Channel Gates open for as long as possible:

- The bill requires the Secretary of the Interior and the Secretary of Commerce to take actions to ensure the Delta Cross Channel Gates remain open to the greatest extent possible, consistent with state and federal law. (*Section 302(b)(1) on page 64, lines 1 to 18*)
- When the gates are closed, water no longer flows directly from the Sacramento into the interior Delta.
- The gate's closures means that the agencies must either reduce pumping or used stored water to "flush" salty water back out through the Delta.
- **Keeping the gates open for longer** therefore helps control salinity in the Interior Delta and avoid releases of CVP and SWP water supplies. This helps both Delta farmers and communities and South of Delta communities.

California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act

Bill Summary

Overview

The bill includes **long-term** and **short-term** provisions to help cope with the historic drought in the West.

Long-term:

With local sponsors as lead, and the federal and state governments providing financial support, the 132 projects identified by **this bill could produce upwards of 1.1 million acre feet in “new” water**, whether through recycling or desalination. The bill does this by:

- Re-authorizing the Desalination Act and providing \$100 million for research, design, and construction of desalination projects (*Sec. 121, pages 21-29*).
- The bill increases funding for WaterSMART from \$350 million to \$500 million and authorizes another \$200 million for recycling through Title XVI (*Sec. 101, pages 9-11*).
- The bill funds RIFIA—a new Reclamation loan and loan guarantee program—at the full \$200 million (*Sec. 131-141, pages 31-44*).
- The bill establishes a new program under Reclamation for providing assistance to communities that have run out of water (*Sec. 101, pages 10-11*).
- **The bill also authorizes \$600 million for storage projects** for storing water from the wet years for use during the dry ones. (*Sec. 112, pages 13-15*).

Short-term:

The bill provides **maximum assurances** that the bill does not violate any **environmental law**, like the Endangered Species Act or the biological opinions. Here’s how:

- **Information from real-time monitoring determines pumping rates**, not specific congressional mandates or targets.
- **Real-time monitoring will produce the information necessary to operate the system more precisely.** (*Section 301, pages 50-54*)
 - The bill authorizes **daily boat monitoring to survey for smelt near the pumps** when turbidity levels are high and the smelt are often attracted to the pumps. (*Sec. 301, page 51*)
 - This bill also authorizes studies to **identify smelts' location in the Delta on a real-time basis**, so pumping can be increased when the fish are not near the pumps and reduced when fish are present. (*Sec. 301, page 51*)
 - The bill commissions a Delta Smelt Distribution Study to **identify how many smelt are in different parts of the Delta** in drier and wetter years, information that is key to running pumps in a manner that isn't harmful to fish.
- **The bill includes a savings clause** that makes clear the drought bill is consistent with all environmental laws, including the Endangered Species Act and biological opinions. (*Section 701, page 76*)

Four key goals guide this legislation:

- **Help communities** most at risk of running out of clean water.
- Provide \$1.3 billion in funding and support for **long-term solutions including water storage, desalination and recycling.**
- **Protect and attempt to restore threatened and endangered species.**
- Modify how the Central Valley Project and State Water Project are operated to **maximize efficiency during the governor's drought emergency declaration** in a manner that adheres to all environmental laws.

LONG-TERM INVESTMENTS

(Title I)

- *This bill authorizes \$1.3 billion in federal support for State and local efforts to increase their drought resiliency.*
- *Here's the ways in which the bill increases investments in California's drought resiliency:*

Assistance for drought-stricken communities

- **Allows rural and disadvantaged communities with fewer than 60,000 residents to apply for grants through a new Reclamation program to help stabilize their water supplies.** Funds can be used for both short-term solutions such as emergency bottled water supplies as well as long-term solutions such as water treatment facilities, wells and connecting homes to centralized water distribution systems. *(Section 101, pages 8-11)*
- Prioritizes State Revolving Funds for communities most at risk of running out of water. Last year, California received more than \$180 million in these funds. **By directing some of these funds to at-risk communities,** the bill provides California with the tools necessary to provide water for public health and safety and to increase drought resiliency. *(Section 102, page 12)*

Storage projects

(\$600 million through 2025)

Storing water during wet years for use in dry years is vital, given the consensus that droughts will grow more severe.

- Authorizes \$600 million for water storage projects in California and other Western states. These may include both federal projects (Shasta) and non-federal projects (Sites, Temperance Flat, Los Vaqueros). *(Sections 111 and 112, pages 12-15)*
- Establishes **deadlines** for the Bureau of Reclamation **to complete feasibility studies** to allow Calfed storage projects to compete for Proposition 1 bond funds. California's Proposition 1—approved by two-thirds of voters in 2014—**provides \$2.7 billion in storage funding.** This means California projects are expected to compete strongly for the matching federal funds made available by this bill. *(Section 115, page 19)*

- **Updates Army Corps dam operations** to increase water supply while reducing flood risk. (*Section 113, pages 15-18*)

Desalination

(\$100 million through 2020)

- Identifies **27 desalination projects throughout California** capable of producing more than 330,000 acre-feet of water per year. The Secretary of the Interior would be required to consider these projects for funding. (*Section 121*)
- Reauthorizes the *Desalination Act* and authorizes the following funds (*Section 122 pages 27-29*):
 - This section also authorizes \$50 million over five years for desalination research projects, such as **improving existing reverse osmosis and membrane technology**, reducing the environmental effects of seawater desalination and developing next-generation technologies to reduce the cost of desalination.
 - \$50 million over five years for feasibility and design for both sea and brackish water desalination projects. Senator Boxer also introduced legislation that would reauthorize the *Desalination Act*, but at lower funding levels.

Water recycling

(\$350 million through 2020)

- The bill identifies **105 water recycling and reuse projects** with the potential to provide more than 853,756 acre-feet per year of “new” water. (*Section 121, pages 21-27*)
- Increases the authorization for the Bureau of Reclamation’s **WaterSMART program from \$350 million to \$500 million**. These grants are for long-term water conservation, reclamation and recycling projects, including small-scale storage and reclamation projects. (*Section 101, page 10*)
- Authorizes **\$200 million for water-recycling projects** through Title XVI that reclaim and reuse wastewaters and naturally impaired ground and surface water. (*Section 123, pages 29-31*).

RIFIA and WaterSense
(\$210 million through 2020)

By providing funds for the most cost-effective federal programs, Washington can help state and local agencies leverage existing dollars into larger projects.

- **Reclamation Infrastructure Finance and Innovation Act (RIFIA):** Authorizes **\$200 million RIFIA**. This loan-guarantee and low-cost loan program will allow water districts and municipalities to leverage loans and loan guarantees for water projects, reducing repayment loan costs by as much as 25 percent. This is modeled after TIFIA, a successful loan-guarantee program for transportation projects. *(Subtitle IV.E; Sections 131 through 141, pages 31-44)*
- **WaterSense:** Authorizes **\$10 million for EPA’s WaterSense program**, which provides information on which household products are water-efficient. The program is modelled after the successful Energy Star program for energy efficient household appliances. *(Section 124, page 31)*

ACTIONS TO BENEFIT FISH AND WILDLIFE
(Title II)

Protecting fish populations
(\$45 million through 2020)

- The bill includes **\$45 million to assist in the protection and recovery of fish populations**. *(Section 201, pages 44-46)*
- Directs federal agencies to develop and implement a pilot program—funded by local water districts—to **protect threatened and endangered salmon and steelhead by removing non-native predator fish** from the Stanislaus River, such as striped bass, smallmouth bass, largemouth bass and black bass. *(Section 203, pages 47-50)*
- Directs federal agencies to develop and implement pilot projects to **reduce invasive aquatic vegetation to improve survival and recovery of endangered fish**. Invasive species—such as water hyacinth—have played major roles in the decline of listed fish in the Bay-Delta, including the Delta Smelt. *(Section 204, pages 50)*

Assisting refuges for migratory birds
(additional \$2 million annually through 2020)

- Authorizes an additional \$2 million dollars per year to **improve water conveyance infrastructure**, which will help deliver water to wildlife refuges. *(Section 202, pages 46-47)*

SHORT-TERM, TEMPORARY OPERATIONS
(Title III)

- *Includes six provisions to move water during the drought in California all while operating within environmental laws and regulations.*
- *Also includes language that makes clear all actions must be taken consistent with law and that none of the provisions violate the Endangered Species Act, the Clean Water Act, the biological opinions, or state law*
- *Since the recycling, desalination, and storage projects this bill identifies will take years, and in some cases decades to construct, we cannot overlook the importance of short-term relief.*

Environmental protections

- The legislation includes a “savings clause” making clear that **nothing in the bill overrides or modifies the *Endangered Species Act* or any other environmental law.** *(Section 701, page 76)*
- **The federal agencies with expertise in the *Endangered Species Act*** (the National Marine Fisheries Service and U.S. Fish and Wildlife Service) **helped write the operations provisions to ensure pumping is in compliance with environmental laws and biological opinions.**

Real-time monitoring to protect fish species

- **Equips the agencies with the tools necessary to operate the system more precisely**, by pumping when the fish are close to the pumps and ratcheting down pumping when the fish are close. *(Section 301, pages 50-54)*
 - Authorizes **daily boat monitoring to survey for smelt near the pumps** when turbidity levels are high and the smelt are often attracted to the pumps.

- Authorizes studies to **identify smelts' location in the Delta on a real-time basis**, so pumping can be increased when the fish are not near the pumps and reduced when fish are present.
- Authorizes a Delta Smelt Distribution Study to **identify how many smelt are in different parts of the Delta** in drier and wetter years, information that is key to running pumps in a manner that isn't harmful to fish.

Temporary Operational Provisions

1) **Pumping at the high end of the Delta Smelt provision** (*Section 301(e), pages 52-53*):

- **How the provision works:** The revised bill gives the agencies the discretion to choose at what level to pump, based on real-time monitoring, updated studies, and the most up-to-date science.
- The revised text simply requires the agencies to explain why pumping at the high end of the smelt biological opinion would cause adverse effects to fish, if they decide to pump at a lower levels. This is a straightforward request: That the agencies exercise their discretion to pump as environmental conditions dictate but provide explanations for the decisions they make

2) **Winter Storms and “payback”** (*Section 303, pages 58-60*):

- **How the provision works:** The revised bill authorizes the agencies to increase pumping during winter storms, and allows the agencies to use their best judgment to determine what level of outflows is the appropriate trigger for increased pumping.
- Given that the agencies have discretion when to increase pumping, litigation risk is greatly reduced.
- **Payback:** Once those storms are over, the agencies would no longer be required to “pay back” the water that was already pumped, unless there was an environmental reason. (*Section 303*)

3) **1:1 transfer ratio:** Provides incentives for increased water transfers. Water transfers sent into the Delta in April and May can only be withdrawn at a 1:1 ratio if the transfers adhere to environmental law and biological opinions. (*Section 302(b)(6), pages 55-56*)

- Given this year's El Niño storms, this provision could provide some relief. Contractors can currently transfer 100% of transfer water because San Joaquin Valley is “critically dry,” and the biological opinion allows a “1:1 ratio” – if the river flows at 1,000 cubic feet per second, then water can be transferred at the same rate.

- Maintaining a 1:1 ratio for transfers through the spring and early summer will ensure that 100% of the water identified for a transfer goes to the communities that need it most, unless there is a sound environmental reason to allow some of that water to be lost through the Delta.
- 4) **Extended window for water transfers :** The Draft Bill extends the window for transfers from April 1 to November 30 (currently July 1 to September 30), if the extended transfers can be done consistent with the biological opinions. (Section 302(b)(6), pages 55-56)
- 5) **Reviewing transfers and barriers:** Environmental reviews of water transfers and the installation and removal of temporary barriers must be completed within 60 days, unless an environmental impact statement is required. (Sec. 302(b)(7)-(9), pages 56-57)
- 6) **Delta Cross-Channel Gates:** The bill requires the Secretary of the Interior and the Secretary of Commerce to take steps to ensure the Gates remain open to the greatest extent possible. (Section 302(b)(7), page 56)
- When the gates are closed, CVP and SWP water stored in Shasta, Oroville and Folsom must be released to reduce salinity in the Interior Delta, resulting in the loss of water that would otherwise be delivered to contractors.
 - This requirement will help control salinity in the Interior Delta and avoid mandatory releases of CVP and SWP water supplies.

ADDITIONAL PROVISIONS

(Titles IV and V)

- Protect and preserve water rights and ensure that some State Water Project and Central Valley Project water contractors do not benefit from the legislation at the expense of others. (Sections 401 to 404, pages 60-64)
- Authorizes the Bureau of Reclamation to expand its service area to include Kettleman City and directs the Bureau of Reclamation to enter into a long-term contract with the Kettleman City Community Services District to **provide them up to 900 acre feet of water**. Kettleman City residents have struggled with contaminated groundwater for years, and this provision would help ensure Kettleman City's 1,500 residents secure access to clean water supplies. (Section 501, pages 64-65)
- This section requires the Secretary of the Interior to **publish expenditures and an evaluation of those expenditures for the Restoration Fund** (in 2014,

revenues were approximately \$53 million), publicize a draft work plan for the upcoming year and solicit public comment. (*Section 502, page 65*)

- Directs the Department of the Interior to **complete its assessment of the risks to water resources** in specific watersheds posed by climate change. (*Section 503, pages 65-66*)
- *If requested*, the Departments of Interior and Commerce are required to provide technical and modeling assistance to the State Water Resources Control Board in protecting water quality during the drought. (*Section 504, page 66*)
- Directs the Bureau of Reclamation to **publish an annual report on water releases for benefit of fish** and evaluate their environmental benefits. (*Section 505, page 66*)
- Requires the Bureau of Reclamation to **identify potential additional storage capacity in New Melones Reservoir** that may be made available to local water and irrigation districts in the Stanislaus River Basin. (*Section 506, page 66-67*)
- Facilitates efforts by the California Department of Water Resources and U.S. Fish and Wildlife Service to **construct a unified federal/state Delta Research Station at the old Rio Vista Army Base**. (*Section 507, page 67*)
- Allows Departments of Interior and Commerce to **provide a single annual report** under the reporting requirements of the Act to reduce the burden on the agencies. (*Section 508, page 67*)

PAYING FOR THE BILL

(Title VI)

- Based on recently enacted legislation to **deauthorize inactive Army Corps of Engineers projects**, this section requires the Secretary of the Interior to identify projects and program that have not received funding in the past five years. After providing an opportunity for public comment and congressional disapproval, the Interior Secretary may formally deauthorize those projects or programs. (*Section 601, pages 67-71*)

Estimated by the Bureau of Reclamation to provide between \$700 million and \$1.3 billion.

- Directs the Department of the Interior to **convert certain existing water service contracts** between the United States and water users' associations to repayment contracts **to allow for prepayment** of such contracts, upon the request of the contractor. Requires a specified percentage of certain receipts generated from prepayment of contracts under this title to fund the construction of CALFED surface water storage. Estimated by the Bureau of Reclamation to provide \$630 million. (Sec.602, pages 71-76)

DURATION

(Title VII)

- **The temporary provisions will sunset two years after the date of enactment or when the governor's drought declaration ends, whichever is later.** (Sec. 702, page 91)

From: Tom Birmingham
Sent: Thursday, January 21, 2016 1:42 PM
To: 'Rojewski, Cole'; 'David L. Bernhardt'; 'Johnny Amaral'
CC: 'Dunklin, Kristina'
Subject: RE: Sen. Feinstein's drought bill discussion draft

Cole,

I have looked very quickly at the emergency operations provisions, and they are very close to what was in the language being negotiated at the end of the last session. Substantively, the language gets us to the same spot. I have not had a chance to review the bill in its entirety.

Please let me know if you would like to have a call to discuss the draft.

Tom

From: Rojewski, Cole [mailto:Cole.Rojewski@mail.house.gov]
Sent: Thursday, January 21, 2016 12:33 PM
To: Tom Birmingham <tbirmingham@westlandswater.org>; David L. Bernhardt <DBernhardt@BHFS.com>; Johnny Amaral <jamaral@westlandswater.org>
Cc: Dunklin, Kristina <Kristina.Dunklin@mail.house.gov>
Subject: Fwd: Sen. Feinstein's drought bill discussion draft

Please find it attached. Let me know your thoughts.

Begin forwarded message:

From: Rojewski, Cole
Sent: Thursday, January 21, 2016 3:32 PM
To: Tom Birmingham; 'David L. Bernhardt'; 'Johnny Amaral'
CC: Dunklin, Kristina
Subject: RE: Sen. Feinstein's drought bill discussion draft

Thanks Tom. I think a call would be good on Monday once we all have time to digest. I don't see how it gets us to the same spot. I've renamed this bill to the "Recycle & DeSal Bill".

Regardless the House bill stands ready for conference. Looking forward to the Senior Senator passing this in the Senate.

From: Tom Birmingham [mailto:tbirmingham@westlandswater.org]
Sent: Thursday, January 21, 2016 12:42 PM
To: Rojewski, Cole; 'David L. Bernhardt'; 'Johnny Amaral'
Cc: Dunklin, Kristina
Subject: RE: Sen. Feinstein's drought bill discussion draft

Cole,

I have looked very quickly at the emergency operations provisions, and they are very close to what was in the language being negotiated at the end of the last session. Substantively, the language gets us to the same spot. I have not had a chance to review the bill in its entirety.

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Tom

From: Rojewski, Cole [mailto:Cole.Rojewski@mail.house.gov]
Sent: Thursday, January 21, 2016 12:33 PM
To: Tom Birmingham <tbirmingham@westlandswater.org>; David L. Bernhardt <DBernhardt@BHFS.com>; Johnny Amaral <amaral@westlandswater.org>
Cc: Dunklin, Kristina <Kristina.Dunklin@mail.house.gov>
Subject: Fwd: Sen. Feinstein's drought bill discussion draft

Please find it attached. Let me know your thoughts.

Begin forwarded message:

From: Philip Williams
Sent: Thursday, January 21, 2016 3:52 PM
To: David L. 'Bernhardt
Subject: Great to see you

David,

I'm sorry I had to step out and missed the chance to say goodbye.

It was great to see you, and I hope to see you again soon. Until then, I wish you the very best.

V/r,
Phil

Philip A. Williams
Deputy General Counsel
Westlands Water District
Office: 916-321-4207
Cell: 931-████-████

(Sent from my iPhone)

From: Bernhardt, David L.
Sent: Thursday, January 21, 2016 4:00 PM
To: Philip Williams
Subject: Re: Great to see you

Phil: I really enjoyed visiting. I think we will see each other next week, at the strategy meeting.

Best,
David

[REDACTED]

On Jan 21, 2016, at 2:52 PM, Philip Williams <pwilliams@westlandswater.org> wrote:

David,

I'm sorry I had to step out and missed the chance to say goodbye.

It was great to see you, and I hope to see you again soon. Until then, I wish you the very best.

V/r,
Phil

Philip A. Williams
Deputy General Counsel
Westlands Water District
Office: 916-321-4207
Cell: 931-[REDACTED]-[REDACTED]

(Sent from my iPhone)

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From: Bernhardt, David L.

Sent: Friday, January 22, 2016 8:01 AM

To: Johnny Amaral; Dennis Cardoza; 'Denny Rehberg'; Ckaren@sidley.com

Subject: No Westlands precall today

Consistent with our protocol, since there is no Westlands call today, there is no precall.

David

David Bernhardt

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From: Denny Rehberg
Sent: Friday, January 22, 2016 8:11 AM
To: Bernhardt, David L.
CC: Johnny Amaral; Dennis Cardoza; Ckaren@sidley.com
Subject: Re: No Westlands precall today

Hadn't heard there was no General call today

> On Jan 22, 2016, at 8:01 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:
>
> Consistent with our protocol, since there is no Westlands call today, there is no precall.
>
> David
>
> David Bernhardt
>
>
>
> STATEMENT OF CONFIDENTIALITY & DISCLAIMER: The information contained in this email message is attorney privileged and confidential, intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this email is strictly prohibited. If you have received this email in error, please notify us immediately by calling (303)-223-1300 and delete the message. Thank you.
>

.....
Mercury.

Denny Rehberg
Co-Chairman
(US Congressman 2001-2013)
The Portrait Building
701 8th Street NW | Suite 650
Washington, DC | 20001
202.261.4000 office | [REDACTED] mobile
www.mercuryllc.com

From: Karen, Catherine
Sent: Friday, January 22, 2016 8:13 AM
To: Denny Rehberg; Bernhardt, David L.
CC: Johnny Amaral; Dennis Cardoza
Subject: RE: No Westlands precall today

ok thank goodness I thought I was the only one that missed that

CATHERINE KAREN
Counsel

Sidley Austin LLP
+1 202 736 8368
ckaren@sidley.com

From: Denny Rehberg [mailto:DRehberg@mercuryllc.com]
Sent: Friday, January 22, 2016 10:11 AM
To: Bernhardt, David L.
Cc: Johnny Amaral; Dennis Cardoza; Karen, Catherine
Subject: Re: No Westlands precall today

Hadn't heard there was no General call today

> On Jan 22, 2016, at 8:01 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

>

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>

> David

>

> David Bernhardt

>

>

>

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>

.....
Mercury.

Denny Rehberg
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701 8th Street NW | Suite 650
Washington, DC | 20001
202.261.4000 office | [REDACTED] mobile
www.mercuryllc.com

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If you are not the intended recipient, please delete the e-mail and any attachments and notify us immediately.

From: Denny Rehberg
Sent: Friday, January 22, 2016 8:13 AM
To: Karen Clark
Subject: Fwd: No Westlands precall today

Did I miss an email or did it get cancelled verbally?



Denny Rehberg
Co-Chairman
(US Congressman 2001-2013)
The Portrait Building
701 8th Street NW | Suite 650
Washington, DC | 20001
202.261.4000 office | [REDACTED] mobile
www.mercuryllc.com

Begin forwarded message:

From: Denny Rehberg <DRehberg@mercuryllc.com>
Date: January 22, 2016 at 8:10:37 AM MST
To: "Bernhardt, David L." <DBernhardt@BHFS.com>
Cc: Johnny Amaral <jamaral@westlandswater.org>, Dennis Cardoza <dcardoza@foley.com>, "Ckaren@sidley.com" <Ckaren@sidley.com>
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received this email in error, please notify us immediately by calling (303)-223-1300 and delete the message. Thank you.

From: Karen Clark
Sent: Friday, January 22, 2016 8:16 AM
To: Denny Rehberg
CC: Johnny Amaral
Subject: Re: No Westlands precall today

Hi Denny,

I don't coordinate the pre-call so I don't know.

Johnny?

Sent from my iPhone

On Jan 22, 2016, at 7:14 AM, Denny Rehberg <DRehberg@mercuryllc.com> wrote:

Did I miss an email or did it get cancelled verbally?

.....
<imageb61a49.JPG>
Denny Rehberg
Co-Chairman
(US Congressman 2001-2013)
The Portrait Building
701 8th Street NW | Suite 650
Washington, DC | 20001
202.261.4000 office | [REDACTED] mobile
www.mercuryllc.com
Begin forwarded message:

From: Denny Rehberg <DRehberg@mercuryllc.com>
Date: January 22, 2016 at 8:10:37 AM MST
To: "Bernhardt, David L." <DBernhardt@BHFS.com>
Cc: Johnny Amaral <jamaral@westlandswater.org>, Dennis Cardoza <dcardoza@foley.com>, "Ckaren@sidley.com" <Ckaren@sidley.com>
Subject: Re: No Westlands precall today

Hadn't heard there was no General call today

On Jan 22, 2016, at 8:01 AM, Bernhardt, David L.
<DBernhardt@BHFS.com> wrote:

Consistent with our protocol, since there is no Westlands call today, there is no precall.

David

David Bernhardt

STATEMENT OF CONFIDENTIALITY & DISCLAIMER: The information contained in this email message is attorney privileged and confidential, intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this email is strictly prohibited. If you have received this email in error, please notify us immediately by calling (303)-223-1300 and delete the message. Thank you.

From: Karen Clark
Sent: Friday, January 22, 2016 8:18 AM
To: Denny Rehberg
CC: Johnny Amaral
Subject: Re: No Westlands precall today

I also had not heard from Tom that we were canceling our Regular PR call.

Sent from my iPhone

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From: Johnny Amaral
Sent: Friday, January 22, 2016 8:19 AM
To: Karen Clark
CC: Denny Rehberg
Subject: Re: No Westlands precall today

Sorry guys, Tom canceled today's call during last Friday's call. I guess I just assumed everybody knew. My fault... I should've communicated it to everyone as a reminder

Best,

Johnny Amaral

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the message. Thank you.

From: Johnny Amaral

Sent: Friday, January 22, 2016 8:21 AM

To: Ed Manning; Carolyn Jensen; Mike Burns; Gayle Holman; <Empty>; Denny Rehberg; Dennis Cardoza; David Bernhardt; Ryan A. ' 'Smith; Catherine Karen; Karen Clark

Subject: No call today

Gang, apparently there's a little bit of confusion about today's call. As a reminder, during last Friday's call, Tom canceled today's call.

Best,

Johnny Amaral

From: Johnny Amaral

Sent: Saturday, January 23, 2016 11:00 AM

To: kyle Lombardi; Ian Foley; Cole Rojewski; Anthony Ratekin; Chris Tudor; Kevin Eastman; Jason Larrabee

Subject: Conference call on Monday

Gentlemen,

Are you available to join us for a conference call on Monday afternoon? It would be a call with myself, Tom Birmingham, and David Bernhardt. The purpose of the call is to discuss the meeting that took place yesterday in San Francisco and to discuss next steps. The call will take place at 2 PM Pacific time. 5 PM your time in DC. If you are interested and willing to join us, let me know and I will send you the call-in information.

Happy snowmageddon.

Best,

Johnny Amaral

From: Rojewski, Cole

Sent: Saturday, January 23, 2016 11:01 AM

To: Johnny Amaral

CC: Lombardi, Kyle; Foley, Ian; Ratekin, Anthony; Tudor, Chris; Eastman, Kevin; Larrabee, Jason

Subject: Re: Conference call on Monday

I'm in.

> On Jan 23, 2016, at 9:59 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

>

> Gentlemen,

>

> Are you available to join us for a conference call on Monday afternoon? It would be a call with myself, Tom Birmingham, and David Bernhardt. The purpose of the call is to discuss the meeting that took place yesterday in San Francisco and to discuss next steps. The call will take place at 2 PM Pacific time. 5 PM your time in DC. If you are interested and willing to join us, let me know and I will send you the call-in information.

>

> Happy snowmageddon.

>

> Best,

>

> Johnny Amaral

>

>

From: Larrabee, Jason

Sent: Saturday, January 23, 2016 11:14 AM

To: Johnny Amaral

CC: Lombardi, Kyle; Foley, Ian; Rojewski, Cole; Ratekin, Anthony; Tudor, Chris; Eastman, Kevin

Subject: Re: Conference call on Monday

Sure. No have nothing better to do than shovel snow

Jason Larrabee

Rep. Jeff Denham

Sent from my iPad

On Jan 23, 2016, at 12:59 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

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Happy snowmageddon.

Best,

Johnny Amaral

From: Eastman, Kevin
Sent: Saturday, January 23, 2016 11:24 AM
To: Johnny Amaral
Subject: Re: Conference call on Monday

Happy to.

Kevin Eastman
Rep. Doug LaMalfa (CA-01)
(202) [REDACTED] mobile

Sent from my mobile misspeller.

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>

> Happy snowmageddon.

>

> Best,

>

> Johnny Amaral

>

>

From: Ratekin, Anthony

Sent: Saturday, January 23, 2016 11:39 AM

To: Johnny Amaral

CC: Lombardi, Kyle; Foley, Ian; Rojewski, Cole; Tudor, Chris; Eastman, Kevin; Larrabee, Jason

Subject: Re: Conference call on Monday

That works for me

Anthony Ratekin

Chief of Staff

Rep. Devin Nunes

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> Johnny Amaral

>

>

From: Ratekin, Anthony
Sent: Saturday, January 23, 2016 11:41 AM
To: Johnny Amaral
Subject: Re: Conference call on Monday

KC told DGN the latest numbers in the delta were 50,000cfs going through the delta and only 2500 Cfs being pumped. Is that accurate? Are those numbers readily available on the interwebs?

Anthony Ratekin
Chief of Staff
Rep. Devin Nunes

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From: Johnny Amaral
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To: Ratekin, Anthony
Subject: Re: Conference call on Monday

Yep

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>>

>> Best,

>>

>> Johnny Amaral

>>

>>

From: Ratekin, Anthony
Sent: Saturday, January 23, 2016 11:42 AM
To: Johnny Amaral
Subject: Re: Conference call on Monday

It was a two part question.....

Anthony Ratekin
Chief of Staff
Rep. Devin Nunes

> On Jan 23, 2016, at 10:41 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

>

> Yep

>

> Best,

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>>> Happy snowmageddon.

>>>

>>> Best,

>>>

>>> Johnny Amaral

>

From: Johnny Amaral
Sent: Saturday, January 23, 2016 11:43 AM
To: Ratekin, Anthony
Subject: Re: Conference call on Monday

Yepx2

Best,

Johnny Amaral

> On Jan 23, 2016, at 10:42 AM, Ratekin, Anthony <Anthony.Ratekin@mail.house.gov> wrote:

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> Rep. Devin Nunes

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>>>> Johnny Amaral

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From: Ratekin, Anthony
Sent: Saturday, January 23, 2016 11:43 AM
To: Johnny Amaral
Subject: Re: Conference call on Monday

Fair enough. Question 3: what is the website address on the interwebs?

Anthony Ratekin
Chief of Staff
Rep. Devin Nunes

> On Jan 23, 2016, at 10:42 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

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>>>>> Happy snowmageddon.

```
>>>>>
>>>>> Best,
>>>>>
>>>>> Johnny Amaral
>>>
>
```

From: Johnny Amaral
Sent: Saturday, January 23, 2016 11:45 AM
To: Ratekin, Anthony
Subject: Re: Conference call on Monday

It's on the DWR and the bureau website, but I will send you our internal documents and emails that detail inflow and exports. It's a daily report that I get from the authority

Best,

Johnny Amaral

> On Jan 23, 2016, at 10:43 AM, Ratekin, Anthony <Anthony.Ratekin@mail house.gov> wrote:

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> Fair enough. Question 3: what is the website address on the interwebs?

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>>

From: Ratekin, Anthony
Sent: Saturday, January 23, 2016 11:46 AM
To: Johnny Amaral
Subject: Re: Conference call on Monday

That would be awesome. I wouldn't mind knowing the daily numbers.

Anthony Ratekin
Chief of Staff
Rep. Devin Nunes

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>

From: Foley, Ian
Sent: Saturday, January 23, 2016 3:21 PM
To: Ratekin, Anthony
CC: Johnny Amaral; Lombardi, Kyle; Rojewski, Cole; Tudor, Chris; Eastman, Kevin; Larrabee, Jason
Subject: Re: Conference call on Monday

Sounds good.

Sent from my iPhone

> On Jan 23, 2016, at 1:39 PM, Ratekin, Anthony <Anthony.Ratekin@mail.house.gov> wrote:

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> That works for me

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>> Best,

>>

>> Johnny Amaral

>>

>>

From: Larrabee, Jason
Sent: Saturday, January 23, 2016 4:59 PM
To: Johnny Amaral
Subject: Re: Conference call on Monday

By the way, if you're going to tell us you plan to support DFs efforts with her water legislation, I'll pass on the call.

Jason Larrabee
Rep. Jeff Denham
Sent from my iPad

On Jan 23, 2016, at 12:59 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

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Happy snowmageddon.

Best,

Johnny Amaral

From: Johnny Amaral
Sent: Saturday, January 23, 2016 5:05 PM
To: Larrabee, Jason
Subject: Re: Conference call on Monday

Are you drinking or are you high?

Best,

Johnny Amaral

> On Jan 23, 2016, at 3:59 PM, Larrabee, Jason <Jason.Larrabee@mail.house.gov> wrote:

>

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> Jason Larrabee

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>

> Happy snowmageddon.

>

> Best,

>

> Johnny Amaral

>

>

From: Larrabee, Jason
Sent: Saturday, January 23, 2016 5:08 PM
To: Johnny Amaral
Subject: Re: Conference call on Monday

Snowed in so both.

Jason Larrabee
Rep. Jeff Denham
Sent from my iPad

On Jan 23, 2016, at 7:04 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

Are you drinking or are you high?

Best,

Johnny Amaral

> On Jan 23, 2016, at 3:59 PM, Larrabee, Jason <Jason.Larrabee@mail.house.gov> wrote:

>

> By the way, if you're going to tell us you plan to support DF's efforts with her water legislation, I'll pass on the call.

>

> Jason Larrabee

> Rep. Jeff Denham

> Sent from my iPad

>

> On Jan 23, 2016, at 12:59 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

>

> Gentlemen,

>

> Are you available to join us for a conference call on Monday afternoon? It would be a call with myself, Tom Birmingham, and David Bernhardt. The purpose of the call is to discuss the meeting that took place yesterday in San Francisco and to discuss next steps. The call will take place at 2 PM Pacific time. 5 PM your time in DC. If you are interested and willing to join us, let me know and I will send you the call-in information.

>

> Happy snowmageddon.

>

> Best,

>

> Johnny Amaral

From: Johnny Amaral
Sent: Saturday, January 23, 2016 5:18 PM
To: Larrabee, Jason
Subject: Re: Conference call on Monday

We want what you guys want. For her to pass a bill out of the Senate. Now, this idea about the energy bill is full of problems as you probably know. Like, do you even think there's going to be an energy bill???

Best,

Johnny Amaral

> On Jan 23, 2016, at 4:08 PM, Larrabee, Jason <Jason.Larrabee@mail.house.gov> wrote:

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> Snowed in so both.

>

> Jason Larrabee

> Rep. Jeff Denham

> Sent from my iPad

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> On Jan 23, 2016, at 7:04 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

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> Best,

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> Johnny Amaral

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>> On Jan 23, 2016, at 3:59 PM, Larrabee, Jason <Jason.Larrabee@mail.house.gov> wrote:

>>

>> By the way, if you're going to tell us you plan to support DFs efforts with her water legislation, I'll pass on the call.

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>> Jason Larrabee

>> Rep. Jeff Denham

>> Sent from my iPad

>>

>> On Jan 23, 2016, at 12:59 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>>

>>

>> Gentlemen,

>>

>> Are you available to join us for a conference call on Monday afternoon? It would be a call with myself, Tom Birmingham, and David Bernhardt. The purpose of the call is to discuss the meeting that took place yesterday in San Francisco and to discuss next steps. The call will take place at 2 PM Pacific time. 5 PM your time in DC. If you are interested and willing to join us, let me know and I will send you the call-in information.

>>

>> Happy snowmageddon.

>>

>> Best,

>>

>> Johnny Amaral

>

From: Larrabee, Jason
Sent: Saturday, January 23, 2016 5:32 PM
To: Johnny Amaral
Subject: Re: Conference call on Monday

Is that what she said? Move it in an energy bill? That's nuts.

I'm more worried about a emergency funding bill with aLove the damage on the east coast from flooding from this storm. Lots of problems in deleware, Maryland, New Jersey and New York. Maybe I'm just paranoid, but it seems like a mini-sandy recovery bill will be pushed.

Jason Larrabee
Rep. Jeff Denham
Sent from my iPad

On Jan 23, 2016, at 7:17 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

We want what you guys want. For her to pass a bill out of the Senate. Now, this idea about the energy bill is full of problems as you probably know. Like, do you even think there's going to be an energy bill???

Best,

Johnny Amaral

> On Jan 23, 2016, at 4:08 PM, Larrabee, Jason <Jason.Larrabee@mail house.gov> wrote:

>

> Snowed in so both.

>

> Jason Larrabee

> Rep. Jeff Denham

> Sent from my iPad

>

> On Jan 23, 2016, at 7:04 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

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> Are you drinking or are you high?

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> Best,

>

> Johnny Amaral

>

>

>> On Jan 23, 2016, at 3:59 PM, Larrabee, Jason <Jason.Larrabee@mail house.gov> wrote:

>>

>> By the way, if you're going to tell us you plan to support DFs efforts with her water legislation, I'll pass on the call.

>>

>> Jason Larrabee

>> Rep. Jeff Denham

>> Sent from my iPad

>>

>> On Jan 23, 2016, at 12:59 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>>

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>> Gentlemen,

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>> Are you available to join us for a conference call on Monday afternoon? It would be a call with myself, Tom Birmingham, and David Bernhardt. The purpose of the call is to discuss the meeting that took place yesterday in San Francisco and to discuss next steps. The call will take place at 2 PM Pacific time. 5 PM your time in DC. If you are interested and willing to join us, let me know

and I will send you the call-in information.

>>

>> Happy snowmageddon.

>>

>> Best,

>>

>> Johnny Amaral

>

From: Lombardi, Kyle

Sent: Saturday, January 23, 2016 5:57 PM

To: 'jamaral@westlandswater.org'; Foley, Ian; Rojewski, Cole; Ratekin, Anthony; Tudor, Chris; Eastman, Kevin; Larrabee, Jason

Subject: Re: Conference call on Monday

Sounds good. I'll be on.

----- Original Message -----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]

Sent: Saturday, January 23, 2016 12:59 PM

To: Lombardi, Kyle; Foley, Ian; Rojewski, Cole; Ratekin, Anthony; Tudor, Chris; Eastman, Kevin; Larrabee, Jason

Subject: Conference call on Monday

Gentlemen,

Are you available to join us for a conference call on Monday afternoon? It would be a call with myself, Tom Birmingham, and David Bernhardt. The purpose of the call is to discuss the meeting that took place yesterday in San Francisco and to discuss next steps. The call will take place at 2 PM Pacific time. 5 PM your time in DC. If you are interested and willing to join us, let me know and I will send you the call-in information.

Happy snowmageddon.

Best,

Johnny Amaral

From: Tudor, Chris

Sent: Sunday, January 24, 2016 9:29 AM

To: Lombardi, Kyle; 'jamaral@westlandswater.org'; Foley, Ian; Rojewski, Cole; Ratekin, Anthony; Eastman, Kevin; Larrabee, Jason

Subject: Re: Conference call on Monday

I can call in as well.

Chris Tudor

Congressman Tom McClintock's Office

Original Message

From: Lombardi, Kyle

Sent: Saturday, January 23, 2016 7:56 PM

To: 'jamaral@westlandswater.org'; Foley, Ian; Rojewski, Cole; Ratekin, Anthony; Tudor, Chris; Eastman, Kevin; Larrabee, Jason

Subject: Re: Conference call on Monday

Sounds good. I'll be on.

----- Original Message -----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]

Sent: Saturday, January 23, 2016 12:59 PM

To: Lombardi, Kyle; Foley, Ian; Rojewski, Cole; Ratekin, Anthony; Tudor, Chris; Eastman, Kevin; Larrabee, Jason

Subject: Conference call on Monday

Gentlemen,

Are you available to join us for a conference call on Monday afternoon? It would be a call with myself, Tom Birmingham, and David Bernhardt. The purpose of the call is to discuss the meeting that took place yesterday in San Francisco and to discuss next steps. The call will take place at 2 PM Pacific time. 5 PM your time in DC. If you are interested and willing to join us, let me know and I will send you the call-in information.

Happy snowmageddon.

Best,

Johnny Amaral

From: Johnny Amaral

Sent: Monday, January 25, 2016 7:50 AM

To: Tudor, Chris

CC: Lombardi, Kyle; Foley, Ian; Rojewski, Cole; Ratekin, Anthony; Eastman, Kevin; Larrabee, Jason

Subject: Re: Conference call on Monday

Sounds like a party then. The call in number is:

[800-800-8000](tel:800-800-8000)

Pass code is 8008008000

2pm PST

Best,

Johnny Amaral

On Jan 24, 2016, at 8:28 AM, Tudor, Chris <Chris.Tudor@mail.house.gov> wrote:

I can call in as well.

Chris Tudor

Congressman Tom McClintock's Office

Original Message

From: Lombardi, Kyle

Sent: Saturday, January 23, 2016 7:56 PM

To: 'jamaral@westlandswater.org'; Foley, Ian; Rojewski, Cole; Ratekin, Anthony; Tudor, Chris; Eastman, Kevin; Larrabee, Jason

Subject: Re: Conference call on Monday

Sounds good. I'll be on.

----- Original Message -----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]

Sent: Saturday, January 23, 2016 12:59 PM

To: Lombardi, Kyle; Foley, Ian; Rojewski, Cole; Ratekin, Anthony; Tudor, Chris; Eastman, Kevin; Larrabee, Jason

Subject: Conference call on Monday

Gentlemen,

Are you available to join us for a conference call on Monday afternoon? It would be a call with myself, Tom Birmingham, and David Bernhardt. The purpose of the call is to discuss the meeting that took place yesterday in San Francisco and to discuss next steps. The call will take place at 2 PM Pacific time. 5 PM your time in DC. If you are interested and willing to join us, let me know and I will send you the call-in information.

Happy snowmageddon.

Best,

Johnny Amaral

From: Ratekin, Anthony
Sent: Monday, January 25, 2016 9:10 AM
To: Johnny Amaral
Subject: RE: Conference call on Monday

CS will call in also

Anthony Ratekin
Chief of Staff
Rep. Devin Nunes (CA-22)

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Monday, January 25, 2016 6:50 AM
To: Tudor, Chris
Cc: Lombardi, Kyle; Foley, Ian; Rojewski, Cole; Ratekin, Anthony; Eastman, Kevin; Larrabee, Jason
Subject: Re: Conference call on Monday

Sounds like a party then. The call in number is:

[800-800-8000](tel:800-800-8000)

Pass code is 8008008000

2pm PST

Best,

Johnny Amaral

On Jan 24, 2016, at 8:28 AM, Tudor, Chris <Chris.Tudor@mail.house.gov> wrote:

I can call in as well.

Chris Tudor
Congressman Tom McClintock's Office
Original Message
From: Lombardi, Kyle
Sent: Saturday, January 23, 2016 7:56 PM
To: 'jamaral@westlandswater.org'; Foley, Ian; Rojewski, Cole; Ratekin, Anthony; Tudor, Chris; Eastman, Kevin; Larrabee, Jason
Subject: Re: Conference call on Monday

Sounds good. I'll be on.

----- Original Message -----

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Saturday, January 23, 2016 12:59 PM
To: Lombardi, Kyle; Foley, Ian; Rojewski, Cole; Ratekin, Anthony; Tudor, Chris; Eastman, Kevin; Larrabee, Jason

Subject: Conference call on Monday

Gentlemen,

Are you available to join us for a conference call on Monday afternoon? It would be a call with myself, Tom Birmingham, and David Bernhardt. The purpose of the call is to discuss the meeting that took place yesterday in San Francisco and to discuss next steps. The call will take place at 2 PM Pacific time. 5 PM your time in DC. If you are interested and willing to join us, let me know and I will send you the call-in information.

Happy snowmageddon.

Best,

Johnny Amaral

From: Johnny Amaral

Sent: Tuesday, January 26, 2016 10:02 AM

To: Dennis Cardoza; Denny Rehberg; Catherine Karen; 'Ryan A. Smith'; David Bernhardt; Ed Manning; Carolyn Jensen; Mike Burns; Tom Birmingham

Subject: dinner wednesday night in Sacramento?

Not a mandatory thing, but some of us are going to get together for an informal, hopefully fun, dinner Wednesday night. Let me know if you're interested in joining.

From: Ed Manning
Sent: Tuesday, January 26, 2016 12:03 PM
To: 'Johnny Amaral'
Subject: RE: dinner wednesday night in Sacramento?

I'd be happy to join.

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Tuesday, January 26, 2016 9:02 AM
To: Dennis Cardoza; Denny Rehberg; Catherine Karen; 'Ryan A. Smith'; David Bernhardt; Ed Manning; Carolyn Jensen; Michael Burns; Tom Birmingham
Subject: dinner wednesday night in Sacramento?

Not a mandatory thing, but some of us are going to get together for an informal, hopefully fun, dinner Wednesday night. Let me know if you're interested in joining.

From: Michael Burns
Sent: Tuesday, January 26, 2016 1:24 PM
To: Johnny Amaral
Subject: RE: dinner wednesday night in Sacramento?

I can join. Do you want us to make reservations?

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: Johnny Amaral <jamaral@westlandswater.org>
Date: 1/26/2016 9:01 AM (GMT-08:00)
To: Dennis Cardoza <dcardoza@foley.com>, Denny Rehberg <drehberg@mercuryllc.com>, Catherine Karen <ckaren@sidley.com>, "Ryan A. Smith" <RSmith@BHFS.com>, David Bernhardt <dbernhardt@bhfs.com>, Ed Manning <emanning@ka-pow.com>, Carolyn Jensen <cjensen@ka-pow.com>, Michael Burns <mburns@ka-pow.com>, Tom Birmingham <tbirmingham@westlandswater.org>
Subject: dinner wednesday night in Sacramento?

Not a mandatory thing, but some of us are going to get together for an informal, hopefully fun, dinner Wednesday night. Let me know if you're interested in joining.

From: Johnny Amaral
Sent: Tuesday, January 26, 2016 1:29 PM
To: Michael Burns
Subject: Re: dinner wednesday night in Sacramento?

That would be great. Any recommendations?

Best,

Johnny Amaral

On Jan 26, 2016, at 12:24 PM, Michael Burns <mburns@ka-pow.com> wrote:

I can join. Do you want us to make reservations?

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: Johnny Amaral <jamaryl@westlandswater.org>

Date: 1/26/2016 9:01 AM (GMT-08:00)

To: Dennis Cardoza <dcardoza@foley.com>, Denny Rehberg <drehberg@mercuryllc.com>, Catherine Karen <ckaren@sidley.com>, "Ryan A. Smith" <RSmith@BHFS.com>, David Bernhardt <dbernhardt@bhfs.com>, Ed Manning <emanning@ka-pow.com>, Carolyn Jensen <cjensen@ka-pow.com>, Michael Burns <mburns@ka-pow.com>, Tom Birmingham <tbirmingham@westlandswater.org>

Subject: dinner wednesday night in Sacramento?

Not a mandatory thing, but some of us are going to get together for an informal, hopefully fun, dinner Wednesday night. Let me know if you're interested in joining.

From: DCardoza@foley.com

Sent: Tuesday, January 26, 2016 1:41 PM

To: Johnny Amaral

CC: Denny Rehberg; Catherine Karen; Ryan A. Smith; David Bernhardt; Ed Manning; Carolyn Jensen; Mike Burns; Tom Birmingham

Subject: Re: dinner wednesday night in Sacramento?

Sounds good

Sent from my iPhone

On Jan 26, 2016, at 9:01 AM, Johnny Amaral <jamaral@westlandswater.org<<mailto:jamaral@westlandswater.org>>> wrote:

Not a mandatory thing, but some of us are going to get together for an informal, hopefully fun, dinner Wednesday night. Let me know if you're interested in joining.

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From: Denny Rehberg

Sent: Tuesday, January 26, 2016 2:29 PM

To: Johnny Amaral

CC: Dennis Cardoza; Catherine Karen; Ryan A. Smith; David Bernhardt; Ed Manning; Carolyn Jensen; Mike Burns; Tom Birmingham

Subject: Re: dinner wednesday night in Sacramento?

I'm in.

On Jan 26, 2016, at 10:03 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

Not a mandatory thing, but some of us are going to get together for an informal, hopefully fun, dinner Wednesday night. Let me know if you're interested in joining.

.....
Mercury.

Denny Rehberg

Co-Chairman

(US Congressman 2001-2013)

The Portrait Building

701 8th Street NW | Suite 650

Washington, DC | 20001

202.261.4000 office | [REDACTED] mobile

www.mercuryllc.com

From: Johnny Amaral

Sent: Tuesday, January 26, 2016 2:33 PM

To: 'Denny Rehberg'

CC: 'Dennis Cardoza'; 'Catherine Karen'; 'Ryan A. Smith'; 'David Bernhardt'; 'Ed Manning'; 'Carolyn Jensen'; 'Mike Burns'; 'Tom Birmingham'

Subject: RE: dinner wednesday night in Sacramento?

Thanks. Mike Burns is going to pick a place for dinner and make a reservation. As soon as he has that set, we will send out the details

From: Denny Rehberg [mailto:DRehberg@mercuryllc.com]

Sent: Tuesday, January 26, 2016 1:29 PM

To: Johnny Amaral

Cc: Dennis Cardoza; Catherine Karen; Ryan A. Smith; David Bernhardt; Ed Manning; Carolyn Jensen; Mike Burns; Tom Birmingham

Subject: Re: dinner wednesday night in Sacramento?

I'm in.

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www.mercuryllc.com

From: Michael Burns
Sent: Tuesday, January 26, 2016 2:46 PM
To: 'Johnny Amaral'
Subject: RE: dinner wednesday night in Sacramento?

Johnny:

Here's your choice:

1. Brasserie – downstairs in our building French/upscale
2. Ella – cross the street from our building – well known chef, superior food
3. Empress – 1 block away, new restaurant, a little more casual but am told the food is excellent and atmosphere fun

Michael Burns
KP PUBLIC AFFAIRS
1201 K Street, Suite 800, Sacramento, CA 95814
p. 916.448.2162 m. 916.600.1271 f. 916.448.4923
w. www.ka-pow.com e. mburns@ka-pow.com

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From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Tuesday, January 26, 2016 1:33 PM
To: 'Denny Rehberg'
Cc: 'Dennis Cardoza'; 'Catherine Karen'; 'Ryan A. Smith'; 'David Bernhardt'; Ed Manning; Carolyn Jensen; Michael Burns; 'Tom Birmingham'
Subject: RE: dinner wednesday night in Sacramento?

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202.261.4000 office | [REDACTED] mobile
www.mercuryllc.com

From: Johnny Amaral
Sent: Tuesday, January 26, 2016 2:48 PM
To: 'Michael Burns'
Subject: RE: dinner wednesday night in Sacramento?

Casual is better, I think

From: Michael Burns [mailto:mburns@ka-pow.com]
Sent: Tuesday, January 26, 2016 1:46 PM
To: 'Johnny Amaral'
Subject: RE: dinner wednesday night in Sacramento?

Johnny:

Here's your choice:

1. Brasserie – downstairs in our building French/upscale
2. Ella – cross the street from our building – well known chef, superior food
3. Empress – 1 block away, new restaurant, a little more casual but am told the food is excellent and atmosphere fun

Michael Burns
KP PUBLIC AFFAIRS
1201 K Street, Suite 800, Sacramento, CA 95814
p. 916.448.2162 m. 916.600.1271 f. 916.448.4923
w. www.ka-pow.com e. mburns@ka-pow.com

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From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Tuesday, January 26, 2016 1:33 PM
To: 'Denny Rehberg'
Cc: 'Dennis Cardoza'; 'Catherine Karen'; 'Ryan A. Smith'; 'David Bernhardt'; Ed Manning; Carolyn Jensen; Michael Burns; 'Tom Birmingham'
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Subject: Re: dinner wednesday night in Sacramento?

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(US Congressman 2001-2013)

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Washington, DC | 20001

202.261.4000 office | [REDACTED] mobile

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From: Karen, Catherine
Sent: Tuesday, January 26, 2016 2:51 PM
To: Johnny Amaral; 'Denny Rehberg'
CC: 'Dennis Cardoza'; 'Ryan A. Smith'; 'David Bernhardt'; 'Ed Manning'; 'Carolyn Jensen'; 'Mike Burns'; 'Tom Birmingham'
Subject: RE: dinner wednesday night in Sacramento?

I get in around 8 pm. Would like to at least stop by.n

Sent with Good (www.good.com)

From: Johnny Amaral
Sent: Tuesday, January 26, 2016 03:33:25 PM
To: 'Denny Rehberg'
Cc: 'Dennis Cardoza'; Karen, Catherine; 'Ryan A. Smith'; 'David Bernhardt'; 'Ed Manning'; 'Carolyn Jensen'; 'Mike Burns'; 'Tom Birmingham'
Subject: RE: dinner wednesday night in Sacramento?

Thanks. Mike Burns is going to pick a place for dinner and make a reservation. As soon as he has that set, we will send out the details

From: Denny Rehberg [mailto:DRehberg@mercuryllc.com]
Sent: Tuesday, January 26, 2016 1:29 PM
To: Johnny Amaral
Cc: Dennis Cardoza; Catherine Karen; Ryan A. Smith; David Bernhardt; Ed Manning; Carolyn Jensen; Mike Burns; Tom Birmingham
Subject: Re: dinner wednesday night in Sacramento?

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Mercury.

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www.mercuryllc.com

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If you are not the intended recipient, please delete the e-mail and any attachments and notify us immediately.

From: Bernhardt, David L.

Sent: Tuesday, January 26, 2016 3:36 PM

To: 'Denny Rehberg'; Johnny Amaral

CC: Dennis Cardoza; Catherine Karen; Smith, Ryan A.; Ed Manning; Carolyn Jensen; Mike Burns; Tom Birmingham

Subject: RE: dinner wednesday night in Sacramento?

Im in too.

From: Denny Rehberg [mailto:DRehberg@mercuryllc.com]

Sent: Tuesday, January 26, 2016 4:29 PM

To: Johnny Amaral

Cc: Dennis Cardoza; Catherine Karen; Smith, Ryan A.; Bernhardt, David L.; Ed Manning; Carolyn Jensen; Mike Burns; Tom Birmingham

Subject: Re: dinner wednesday night in Sacramento?

I'm in.

On Jan 26, 2016, at 10:03 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

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Mercury.

Denny Rehberg

Co-Chairman

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From: Denny Rehberg
Sent: Tuesday, January 26, 2016 3:39 PM
To: Bernhardt, David L.
CC: Johnny Amaral; Dennis Cardoza; Catherine Karen; Smith, Ryan A.; Ed Manning; Carolyn Jensen; Mike Burns; Tom Birmingham
Subject: Re: dinner wednesday night in Sacramento?

With clean unders we all hope.

On Jan 26, 2016, at 3:36 PM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

Im in too.

From: Denny Rehberg [<mailto:DRehberg@mercuryllc.com>]
Sent: Tuesday, January 26, 2016 4:29 PM
To: Johnny Amaral
Cc: Dennis Cardoza; Catherine Karen; Smith, Ryan A.; Bernhardt, David L.; Ed Manning; Carolyn Jensen; Mike Burns; Tom Birmingham
Subject: Re: dinner wednesday night in Sacramento?

I'm in.

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.....
<image001.jpg>
Denny Rehberg
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(US Congressman 2001-2013)
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701 8th Street NW | Suite 650
Washington, DC | 20001
202.261.4000 office | [REDACTED] mobile
www.mercuryllc.com

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From: Smith, Ryan A.
Sent: Tuesday, January 26, 2016 4:04 PM
To: Bernhardt, David L.; 'Denny Rehberg'; Johnny Amaral
CC: Dennis Cardoza; Catherine Karen; Ed Manning; Carolyn Jensen; Mike Burns; Tom Birmingham
Subject: RE: dinner wednesday night in Sacramento?

I would, but unfortunately I will be getting in too late that evening.

From: Bernhardt, David L.
Sent: Tuesday, January 26, 2016 5:36 PM
To: 'Denny Rehberg'; Johnny Amaral
Cc: Dennis Cardoza; Catherine Karen; Smith, Ryan A.; Ed Manning; Carolyn Jensen; Mike Burns; Tom Birmingham
Subject: RE: dinner wednesday night in Sacramento?

Im in too.

From: Denny Rehberg [<mailto:DRehberg@mercuryllc.com>]
Sent: Tuesday, January 26, 2016 4:29 PM
To: Johnny Amaral
Cc: Dennis Cardoza; Catherine Karen; Smith, Ryan A.; Bernhardt, David L.; Ed Manning; Carolyn Jensen; Mike Burns; Tom Birmingham
Subject: Re: dinner wednesday night in Sacramento?

I'm in.

On Jan 26, 2016, at 10:03 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

Not a mandatory thing, but some of us are going to get together for an informal, hopefully fun, dinner Wednesday night. Let me know if you're interested in joining.

.....
Mercury.

Denny Rehberg
Co-Chairman
(US Congressman 2001-2013)
The Portrait Building
701 8th Street NW | Suite 650
Washington, DC | 20001
202.261.4000 office | [REDACTED] mobile
www.mercuryllc.com

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From: Larrabee, Jason
Sent: Wednesday, January 27, 2016 7:51 AM
To: Johnny Amaral
Subject: RE: Conference call on Monday

I tried you on Monday to catch up. Please give me a call to discuss. I wasn't able to join due to a family issue. Thanks.

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Monday, January 25, 2016 9:50 AM
To: Tudor, Chris
Cc: Lombardi, Kyle; Foley, Ian; Rojewski, Cole; Ratekin, Anthony; Eastman, Kevin; Larrabee, Jason
Subject: Re: Conference call on Monday

Sounds like a party then. The call in number is:

[800-800-8000](tel:800-800-8000)

Pass code is 8008008000

2pm PST

Best,

Johnny Amaral

On Jan 24, 2016, at 8:28 AM, Tudor, Chris <Chris.Tudor@mail.house.gov> wrote:

I can call in as well.

Chris Tudor
Congressman Tom McClintock's Office
Original Message
From: Lombardi, Kyle
Sent: Saturday, January 23, 2016 7:56 PM
To: 'jamaral@westlandswater.org'; Foley, Ian; Rojewski, Cole; Ratekin, Anthony; Tudor, Chris; Eastman, Kevin; Larrabee, Jason
Subject: Re: Conference call on Monday

Sounds good. I'll be on.

----- Original Message -----

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Saturday, January 23, 2016 12:59 PM
To: Lombardi, Kyle; Foley, Ian; Rojewski, Cole; Ratekin, Anthony; Tudor, Chris; Eastman, Kevin; Larrabee, Jason
Subject: Conference call on Monday

Gentlemen,

Are you available to join us for a conference call on Monday afternoon? It would be a call with myself, Tom Birmingham, and David Bernhardt. The purpose of the call is to discuss the meeting that took place yesterday in San Francisco and to discuss next steps. The call will take place at 2 PM Pacific time. 5 PM your time in DC. If you are interested and willing to join us, let me know and I will send you the call-in information.

Happy snowmageddon.

Best,

Johnny Amaral

From: Johnny Amaral
Sent: Wednesday, January 27, 2016 11:18 AM
To: David Bernhardt
Subject: My lunch meeting got cancelled

I'm driving thru fresno now and should be in Sacto by 12:30. You have plans?

Best,

Johnny Amaral

From: Bernhardt, David L.
Sent: Wednesday, January 27, 2016 12:07 PM
To: 'Johnny Amaral'
Subject: RE: My lunch meeting got cancelled

I'm tied up most of the day. I am free after 4 p.m., if you wanted to visit before dinner.

-----Original Message-----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Wednesday, January 27, 2016 1:18 PM
To: Bernhardt, David L.
Subject: My lunch meeting got cancelled

I'm driving thru fresno now and should be in Sacto by 12:30. You have plans?

Best,

Johnny Amaral

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From: Johnny Amaral
Sent: Wednesday, January 27, 2016 4:37 PM
To: Bernhardt, David L.
Subject: Re: My lunch meeting got cancelled

I just finished my 2 o'clock meeting. I need to fill up my truck with gas, and then will head over to the Hyatt. See you in the lobby?

Best,

Johnny Amaral

> On Jan 27, 2016, at 11:08 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

>

> I'm tied up most of the day. I am free after 4 p.m., if you wanted to visit before dinner.

>

> -----Original Message-----

> From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]

> Sent: Wednesday, January 27, 2016 1:18 PM

> To: Bernhardt, David L.

> Subject: My lunch meeting got cancelled

>

>

> I'm driving thru fresno now and should be in Sacto by 12:30. You have plans?

>

> Best,

>

> Johnny Amaral

>

>

>

>

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From: Bernhardt, David L.
Sent: Wednesday, January 27, 2016 4:58 PM
To: Johnny Amaral
Subject: Re: My lunch meeting got cancelled

Great. I'll meet you there.
David Bernhardt

> On Jan 27, 2016, at 3:37 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:
>
>
> I just finished my 2 o'clock meeting. I need to fill up my truck with gas, and then will head over to the Hyatt. See you in the lobby?
>
> Best,
>
> Johnny Amaral
>
>
>> On Jan 27, 2016, at 11:08 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:
>>
>> I'm tied up most of the day. I am free after 4 p.m., if you wanted to visit before dinner.
>>
>> -----Original Message-----
>> From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
>> Sent: Wednesday, January 27, 2016 1:18 PM
>> To: Bernhardt, David L.
>> Subject: My lunch meeting got cancelled
>>
>>
>> I'm driving thru fresno now and should be in Sacto by 12:30. You have plans?
>>
>> Best,
>>
>> Johnny Amaral
>>
>>
>>
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received this email in error, please notify us immediately by calling (303)-223-1300 and delete the message. Thank you.
>

From: Johnny Amaral
Sent: Wednesday, January 27, 2016 5:10 PM
To: Bernhardt, David L.
Subject: Re: My lunch meeting got cancelled

Cool. See you in a couple minutes I'm walking over now

Best,

Johnny Amaral

> On Jan 27, 2016, at 3:58 PM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

>

> Great. I'll meet you there.

> David Bernhardt

>

>

>> On Jan 27, 2016, at 3:37 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>>

>>

>> I just finished my 2 o'clock meeting. I need to fill up my truck with gas, and then will head over to the Hyatt. See you in the lobby?

>>

>> Best,

>>

>> Johnny Amaral

>>

>>

>>> On Jan 27, 2016, at 11:08 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

>>>

>>> I'm tied up most of the day. I am free after 4 p m., if you wanted to visit before dinner.

>>>

>>> -----Original Message-----

>>> From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]

>>> Sent: Wednesday, January 27, 2016 1:18 PM

>>> To: Bernhardt, David L.

>>> Subject: My lunch meeting got cancelled

>>>

>>>

>>> I'm driving thru fresno now and should be in Sacto by 12:30. You have plans?

>>>

>>> Best,

>>>

>>> Johnny Amaral

>>>

>>>

>>>

>>>

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>>

From: Johnny Amaral

Sent: Thursday, January 28, 2016 9:31 AM

To: David Bernhardt; Denny Rehberg; Catherine Karen; Ryan A. ' 'Smith; Dennis Cardoza

Subject: I'm in the Starbucks behind the Hyatt if you want to join

Best,

Johnny Amaral

From: Bernhardt, David L.
Sent: Thursday, January 28, 2016 9:50 AM
To: Johnny Amaral
Subject: Re: I'm in the Starbucks behind the Hyatt if you want to join

Doesn't the meeting start at 10?

██████████

> On Jan 28, 2016, at 8:30 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:
>
>
>
>
> Best,
>
> Johnny Amaral
>
>

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From: Johnny Amaral

Sent: Thursday, January 28, 2016 9:51 AM

To: Bernhardt, David L.

Subject: Re: I'm in the Starbucks behind the Hyatt if you want to join

Yes

Best,

Johnny Amaral

> On Jan 28, 2016, at 8:50 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

>

> Doesn't the meeting start at 10?

>

> [REDACTED]

>

>> On Jan 28, 2016, at 8:30 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>>

>>

>>

>>

>> Best,

>>

>> Johnny Amaral

>

>

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From: Jason Peltier

Sent: Friday, January 29, 2016 10:53 AM

To: Johnny Amaral; Dennis Cardoza; David Bernhardt; Denny Rehberg; Ara Azhderian

Subject: FW: Flake, Feinstein Introduce Amendment to Aid Drought-Stricken States

From: Dan Keppen [mailto:dankeppen@charter.net]

Sent: Friday, January 29, 2016 9:24 AM

Dear Alliance Directors and Advisory Committee Members:

Below, please see Senator Flake's press release and link to an amendment that includes language that the Alliance circulated for comment last fall. Key officials on Capitol Hill understand the Alliance's involvement in vetting the language, but I wanted to make sure you were aware of what's happening and that our organization's name has been invoked. Last fall when I circulated this language, we didn't run into any objections and received affirmative support from some Alliance members, particularly in California, since Senator Feinstein is a co-author of this bill. However, for now, we are not officially on record as supporting this amendment. I would be very interested in hearing from you after you have shared this with your associates.

I am on my way to Portland (OREGON) today, where I'll be speaking to the Tri-State meeting, where members of the Idaho Water Users, Oregon Water Resources Congress and Washington State Water Resources Association will be in attendance. Please do not hesitate to contact me if you have any questions or concerns.

Best regards –

Dan Keppen
Executive Director



FOR IMMEDIATE RELEASE

Thursday, Jan. 28, 2016

CONTACT: Flake Press Office (202) 228-2046

press@flake.senate.gov | [@FlakePress](https://twitter.com/FlakePress)

Flake, Feinstein Introduce Amendment to Aid Drought-Stricken States

Washington, D.C. – U.S. Sens. Jeff Flake (R-Ariz.) and Dianne Feinstein (D-Calif.) today offered a [bipartisan amendment](#), which would help drought-stricken Western states store more water in hydropower reservoirs, to the energy bill currently under debate in the Senate.

Under current law, federal and non-federal dam operators utilize outdated forecasting methods to determine how much water storage capacity in a dam should be left unfilled in order to prevent weather-induced flooding. The Flake-Feinstein amendment would direct up to 15 of these hydroelectric dams to reevaluate flood control operations with up-to-date forecasting information and modern forecasting techniques. The result will be dam operations that more accurately reflect the lessened chance of flooding during dry years, allowing those dams to use more of their water storage capacity to store much-needed, electricity-producing water.

“Congress ought to be taking every action to help drought-stricken states better utilize current resources to strengthen their water management and storage capacity,” said Flake. **“ Today I am happy to introduce this commonsense legislation with Senator Feinstein to help our Western states better use existing dams to aid water conservation efforts.**

“In the midst of what is shaping up to be a robust El Niño, we must do all we can to capture additional water and increase our water supply. This amendment does just that. By modernizing the Army Corps of Engineers and Reclamation storage operations at up to 15 sites, we would get much-needed additional water storage at little to no cost. And with the benefit of technological advancements in weather modeling, the agencies could do this while still protecting the surrounding communities from the risk of flooding. Such efforts have worked in the past. When storage operations at Prado Dam were updated, for example, the Corps created space for an additional 10,500 acre feet. It makes sense to replicate that model elsewhere,” said Feinstein.

Flake also spoke in support of the amendment on the Senate floor today. A video and the transcript of the remarks can be viewed below.



Mr. President, I rise today to speak in support of a bipartisan amendment that I have introduced, along with the senior senator from California, that would enable Arizona and California and other drought-stricken states to store more water in hydroelectric dams. As everyone knows, water is a controversial issue in the west. Arizona

and California have long been at odds on a number of water-related issues, particularly the very long-running Supreme Court case on the Colorado River. However, recognizing the importance of wisely managing water in the West is something that we can all agree on and look for ways to cooperate on. Today I am glad to introduce, along with Senator Feinstein from California, one of these helpful management provisions to better use existing dams in our drought-stricken states. These dams are critical to the management of the West and we've got to store water obviously in dry times.

The Western U.S. relies on dams to produce clean, renewable hydropower as well. Also to deliver drinking water to growing cities, to irrigate fields but because they are large and expensive, these dams are increasingly difficult to have built; it's imperative that we make the most of those that we have already.

In a bill introduced last year, Senator Feinstein included a pilot program to allow the updating of how flood control operations are conducted at many dams. This very helpful provision allows the use of modern forecasting tools and better records of hydrology to reevaluate the flood control operations in order to create additional water storage space. Increased storage space would allow more water to be kept behind the dams, allowing more hydropower to be produced exactly when it's needed.

This amendment simply expands on Senator Feinstein's proposal broadening the scope to all drought-stricken states, not just California, and increasing the number of projects in the pilot program and allowing more types of facilities to opt into this pilot program. This is a commonsense amendment, it will help us make the most of the capacity that we have to store water and to produce hydropower. And I would urge its adoption.

Background: In December, Flake and Feinstein led a bipartisan coalition of nine western senators in sending a letter to Senate Energy and Natural Resources Committee Chairman Lisa Murkowski (R-Alaska) and Ranking Member Maria Cantwell (D-Wash.) encouraging the committee to advance west-wide drought legislation. The signed letter can be viewed [here](#).

###

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From: Bernhardt, David L.

Sent: Friday, January 29, 2016 11:49 AM

To: Johnny Amaral

Subject: It's not her big bill

Attachments: s-amdt-3057--hydropower-reservoir-operation-improvement-002-.pdf; ATT00001.txt

http://www.flake.senate.gov/public/_cache/files/2c4c4178-17d4-4fb5-86d0-ef376e8ea532/s-amdt-3057--hydropower-reservoir-operation-improvement-002-.pdf

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AMENDMENT NO. _____ Calendar No. _____

Purpose: To provide for hydropower reservoir operation improvement.

IN THE SENATE OF THE UNITED STATES—114th Cong., 2d Sess.

AMENDMENT N^o 3057By Flakeenergy policy of
purposes.To: Amnt No 2953

_____ and

9
Page(s)

be printed

GPO: 2014 91-623 (mac)

MR. FLAKE

Viz: (FOR HIMSELF AND MRS. FEINSTEIN)
to the amendment (No. 2953) proposed by Mr. Murkowski

1 At the appropriate place, insert the following:

2 SEC. _____. **HYDROPOWER RESERVOIR OPERATION IM-**
3 **PROVEMENT.**

4 (a) DEFINITIONS.—In this section:

5 (1) RESERVED WORKS.—The term “reserved
6 works” means any Bureau of Reclamation project
7 facility at which the Secretary of the Interior carries
8 out the operation and maintenance of the project fa-
9 cility.

10 (2) SECRETARY.—The term “Secretary” means
11 the Secretary of the Army.

1 (3) TRANSFERRED WORKS.—The term “trans-
2 ferred works” means a Bureau of Reclamation
3 project facility, the operation and maintenance of
4 which is carried out by a non-Federal entity, under
5 the provisions of a formal operation and mainte-
6 nance transfer contract.

7 (4) TRANSFERRED WORKS OPERATING ENTI-
8 TY.—The term “transferred works operating entity”
9 means the organization that is contractually respon-
10 sible for operation and maintenance of transferred
11 works.

12 (b) REPORT.—Not later than 180 days after the date
13 of enactment of this Act, the Secretary shall submit to
14 the Committees on Appropriations of the Senate and the
15 House of Representatives a report including, for any State
16 in which a county designated by the Secretary of Agri-
17 culture as a drought disaster area during water year 2015
18 is located, a list of projects, including Corps of Engineers
19 projects, non-Federal projects, and transferred works, op-
20 erated for flood control in accordance with rules prescribed
21 by the Secretary pursuant to section 7 of the Act of De-
22 cember 22, 1944 (commonly known as the “Flood Control
23 Act of 1944”) (58 Stat. 890, chapter 665), including, as
24 applicable—

1 (1) the year the original water control manual
2 was approved;

3 (2) the year for any subsequent revisions to the
4 water control plan and manual of the project;

5 (3) a list of projects for which—

6 (A) operational deviations for drought con-
7 tingency have been requested;

8 (B) the status of the request; and

9 (C) a description of how water conserva-
10 tion and water quality improvements were ad-
11 dressed; and

12 (4) a list of projects for which permanent or
13 seasonal changes to storage allocations have been re-
14 quested, and the status of the request.

15 (c) PROJECT IDENTIFICATION.—Not later than 60
16 days after the date of completion of the report under sub-
17 section (b), the Secretary shall identify any projects de-
18 scribed in the report—

19 (1) for which the modification of the water op-
20 erations manuals, including flood control rule curve,
21 would be likely to enhance existing authorized
22 project purposes for water supply benefits and flood
23 control operations;

24 (2) for which the water control manual and
25 hydrometeorological information establishing the

1 flood control rule curves of the project have not been
2 substantially revised during the 15-year period end-
3 ing on the date of review by the Secretary; and

4 (3) for which the non-Federal sponsor or spons-
5 ors of a Corps of Engineers project, the owner of
6 a non-Federal project, or the non-Federal trans-
7 ferred works operating entity, as applicable, has sub-
8 mitted to the Secretary a written request to revise
9 water operations manuals, including flood control
10 rule curves, based on the use of improved weather
11 forecasting or run-off forecasting methods, new wa-
12 tershed data, changes to project operations, or struc-
13 tural improvements.

14 (d) PILOT PROJECTS.—

15 (1) IN GENERAL.—Not later than 1 year after
16 the date of identification of projects under sub-
17 section (c), if any, the Secretary shall carry out not
18 more than 15 pilot projects, which shall include not
19 less than 6 non-Federal projects, to implement revi-
20 sions of water operations manuals, including flood
21 control rule curves, based on the best available
22 science, which may include—

23 (A) forecast-informed operations;

24 (B) new watershed data; and

1 (C) if applicable, in the case of non-Fed-
2 eral projects, structural improvements.

3 (2) CONSULTATION.—In implementing a pilot
4 project under this subsection, the Secretary shall
5 consult with all affected interests, including—

6 (A) non-Federal entities responsible for op-
7 erations and maintenance costs of a Federal fa-
8 cility;

9 (B) individuals and entities with storage
10 entitlements; and

11 (C) local agencies with flood control re-
12 sponsibilities downstream of a facility.

13 (e) COORDINATION WITH NON-FEDERAL PROJECT
14 ENTITIES.—If a project identified under subsection (c)
15 is—

16 (1) a non-Federal project, the Secretary, prior
17 to carrying out an activity under this section,
18 shall—

19 (A) consult with the non-Federal project
20 owner; and

21 (B) enter into a cooperative agreement,
22 memorandum of understanding, or other agree-
23 ment with the non-Federal project owner de-
24 scribing the scope and goals of the activity and
25 the coordination among the parties; and

1 (2) a Federal project, the Secretary, prior to
2 carrying out an activity under this section, shall—

3 (A) consult with each Federal and non-
4 Federal entity (including a municipal water dis-
5 trict, irrigation district, joint powers authority,
6 transferred works operating entity, or other
7 local governmental entity) that currently—

8 (i) manages (in whole or in part) a
9 Federal dam or reservoir; or

10 (ii) is responsible for operations and
11 maintenance costs; and

12 (B) enter into a cooperative agreement,
13 memorandum of understanding, or other agree-
14 ment with each such entity describing the scope
15 and goals of the activity and the coordination
16 among the parties.

17 (f) CONSIDERATION.—In designing and imple-
18 menting a forecast-informed reservoir operations plan, the
19 Secretary may consider—

20 (1) the relationship between ocean and atmos-
21 pheric conditions, including—

22 (A) the El Niño and La Niña cycles; and

23 (B) the potential for above-normal, normal,
24 and below-normal rainfall for the coming water

1 year, including consideration of atmospheric
2 river forecasts;

3 (2) the precipitation and runoff index specific
4 to the basin and watershed of the relevant dam or
5 reservoir, including incorporating knowledge of
6 hydrological and meteorological conditions that influ-
7 ence the timing and quantity of runoff;

8 (3) improved hydrologic forecasting for precipi-
9 tation, snowpack, and soil moisture conditions;

10 (4) an adjustment of operational flood control
11 rule curves to optimize water supply storage and re-
12 liability, hydropower production, environmental bene-
13 fits for flows and temperature, and other authorized
14 project benefits, without a reduction in flood safety;
15 and

16 (5) proactive management in response to
17 changes in forecasts.

18 (g) FUNDING.—The Secretary may accept and ex-
19 pend amounts from non-Federal entities to fund all or a
20 portion of the cost of carrying out a review or revision
21 of operational documents, including water control plans,
22 water control manuals, water control diagrams, release
23 schedules, rule curves, operational agreements with non-
24 Federal entities, and any associated environmental docu-
25 mentation for—

1 (1) a Corps of Engineers project;

2 (2) a non-Federal project regulated for flood
3 control by the Secretary; or

4 (3) a Bureau of Reclamation transferred works
5 regulated for flood control by the Secretary.

6 (h) EFFECT.—

7 (1) MANUAL REVISIONS.—A revision of a man-
8 ual shall not interfere with the authorized purposes
9 of a Federal project or the existing purposes of a
10 non-Federal project regulated for flood control by
11 the Secretary.

12 (2) EFFECT OF SECTION.—

13 (A) Nothing in this section authorizes the
14 Secretary to carry out, at a Federal dam or res-
15 ervoir, any project or activity for a purpose not
16 otherwise authorized as of the date of enact-
17 ment of this Act.

18 (B) Nothing in this section affects or
19 modifies any obligation of the Secretary under
20 State law.

21 (3) BUREAU OF RECLAMATION RESERVED
22 WORKS EXCLUDED.—This section—

23 (A) shall not apply to any dam or reservoir
24 operated by the Bureau of Reclamation as a re-
25 served work, unless all non-Federal project

1 sponsors of a reserved work jointly provide to
2 the Secretary a written request for application
3 of this section to the project; and

4 (B) shall apply only to Bureau of Reclama-
5 tion transferred works at the written request of
6 the transferred works operating entity.

7 (i) MODIFICATIONS TO MANUALS AND CURVES.—Not
8 later than 180 days after the date of completion of a modi-
9 fication to an operations manual or flood control rule
10 curve, the Secretary shall submit to Congress a report re-
11 garding the components of the forecast-based reservoir op-
12 erations plan incorporated into the change.

David Bernhardt

From: Bernhardt, David L.
Sent: Friday, January 29, 2016 12:29 PM
To: Johnny Amaral
Subject: Hearing

Johnny: Give me a call when you can. [REDACTED]

David Bernhardt

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From: Jason Peltier

Sent: Saturday, January 30, 2016 7:09 AM

To: Dan Keppen; Mark Limbaugh; Dennis Cardoza; David Bernhardt; Ara Azhderian; Frances Mizuno; Jon Rubin; Johnny Amaral; Sue Ramos; Philip Williams

Subject: FW: Forthcoming report on federal drought response: Thank you!

Fyi, I am skeptical given the advisory group.

From: Ellen Hanak [mailto:hanak@ppic.org]

Sent: Friday, January 29, 2016 6:45 PM

To: Ellen Hanak <hanak@ppic.org>; Jeff Mount <[REDACTED]@[REDACTED]>

Cc: Caitrin Phillips Chappelle <chappelle@ppic.org>; Bonnie Colby (bcolby@ag.arizona.edu) (bcolby@ag.arizona.edu) <bcolby@ag.arizona.edu>; Richard Frank <rmfrank@ucdavis.edu>; Greg Gartrell ([REDACTED]@[REDACTED]) <[REDACTED]@[REDACTED]> BRIAN GRAY ([REDACTED]@[REDACTED]) <[REDACTED]@[REDACTED]> Douglas S Kenney <douglas.kenney@colorado.edu>; Jay Lund DAVIS <jrlund@ucdavis.edu>; Peter Moyle <pumoyle@ucdavis.edu>; Leon Szeptycki <leonsz@stanford.edu>; Jelena Jezdimirovic <jezdimirovic@ppic.org>

Subject: Forthcoming report on federal drought response: Thank you!

Greetings,

We are delighted to inform you that our *Improving the Federal Response to Western Drought: Five Areas for Reform* report will be released on February 2nd. You should receive an email with a link to the report that morning—let us know if you don't receive it (sometimes spam filters can block delivery).

On February 3rd, we are cohosting an event with Resources For The Future in DC to discuss the role of the federal government in western water and drought management. More information about the event, including the registration form and the list of speakers, is available [here](#). You can also [sign up](#) for a live webcast.

On behalf of the entire study team (cc'ed above), we'd like to thank you for your assistance in this work. We benefited greatly from the help of experts like yourself who took time out of their busy schedules to share their insights and perspectives and to help us track down and interpret information about various aspects of federal drought policy. We are very grateful.

Please don't hesitate to get in touch if you have any questions.

With kind regards,

Ellen Hanak and Jeff Mount

Ellen Hanak
Senior Fellow and Center Director
PPIC Water Policy Center

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Any opinions expressed in this message are those of the author alone and do not necessarily reflect any position of the Public Policy Institute of California.

From: Johnny Amaral

Sent: Monday, February 1, 2016 8:43 AM

To: Dennis Cardoza; Denny Rehberg; David Bernhardt; Ryan A. ' 'Smith; Catherine Karen; Ed Manning; Carolyn Jensen; Mike Burns

Subject: No call today

I'm tied up till 1 PM. Sorry for the late notice

Best,

Johnny Amaral

From: Smith, Ryan A.

Sent: Monday, February 1, 2016 6:32 PM

To: jamaral@westlandswater.org

CC: Bernhardt, David L.

Subject: Fwd: Rep. Valadao introduces H.R. 4366 - San Luis Unit Drainage Resolution Act

Attachments: Legislative Summary of the San Luis Drainage Resolution Act.pdf; ATT00001.htm; Section by Section of the San Luis Drainage Resolution Act.pdf; ATT00002.htm; Westlands-v-United-States-Settlement.pdf; ATT00003.htm; H.R. 4366 - San Luis Drainage Resolution Act by Rep. Valadao.pdf; ATT00004.htm

Johnny,

See below from Scott Petersen. I will call Scott tomorrow to check in and will report back.

Ryan

Sent from my iPhone

Begin forwarded message:

From: "Petersen, Scott" <Scott.Petersen@mail.house.gov>

Date: February 1, 2016 at 4:59:40 PM EST

To: "Petersen, Scott" <Scott.Petersen@mail.house.gov>


Cc: "Wainwright, Matt" <Matt.Wainwright@mail.house.gov>

Subject: FW: Rep. Valadao introduces H.R. 4366 - San Luis Unit Drainage Resolution Act

Good afternoon all,

I hope that this e-mail finds you well! We're obviously all praying for more rain and higher pumping rates and while that's the highest priority, it's not the only thing we're all working on, naturally. Today, I'm following up on the e-mail sent out on January 12, 2016, requesting comments on the recently introduced H.R. 4366, the San Luis Drainage Resolution Act.

To those who have filed responses or comments, thank you. For those of you who wish to provide your district's input to Rep. Costa, please ensure that your comments are submitted to our office by COB tomorrow. The Congressman has been asked to co-sponsor the bill and is interested in your thoughts.

If you have any questions or need any further information, I can be reached on my mobile phone at 202- or via e-mail at any time.

Thank you for your attention and my boss and the rest of the staff look forward to continuing to work with you all to improve conditions for the Valley.

Best, Scott

J. Scott Petersen, P.E.

Deputy Chief of Staff

Rep. Jim Costa (CA-16)

From: Petersen, Scott

Sent: Tuesday, January 12, 2016 2:35 PM

To: Petersen, Scott

Cc: Wainwright, Matt

Subject: FW: Rep. Valadao introduces H.R. 4366 - San Luis Unit Drainage Resolution Act

Good afternoon all,

Congressman Valadao introduced the San Luis Drainage Resolution Act today and the details are included. Please review the attached legislation and information and provide any responses, requested revisions or comments to me by close of business on Friday, January 22.

Thank you all for your time and consideration.

Best, Scott

J. Scott Petersen, P.E.

Deputy Chief of Staff
Rep. Jim Costa (CA-16)

From: Rojewski, Cole

Sent: Tuesday, January 12, 2016 2:02 PM

Subject: Rep. Valadao introduces H.R. 4366 - San Luis Unit Drainage Resolution Act

All-

I wanted to give you the heads up Congressman Valadao just introduced the San Luis Unit Drainage Resolution Act. This legislation would authorize a settlement of a long-standing dispute between the United States and the Westlands Water District concerning the management of drainage water within Westlands' service area in the San Luis Unit of the Central Valley Project (CVP) in California. In doing so, the legislation will save the American taxpayers billions of dollars.

Please find supporting documents attached. I would love to have you all as cosponsors. Please reach out with any questions you may have.

Thank you,
Cole

Cole Rojewski
Chief of Staff
Rep. David G. Valadao (CA-21)

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San Luis Drainage Resolution Act

Legislative Summary

The San Luis Unit Drainage Resolution Act would settle a long-standing dispute between the United States and the Westlands Water District concerning the management of drainage water within Westlands' service area in the San Luis Unit of the Central Valley Project in California. In doing so, it will save the American taxpayers billions of dollars.

The Drainage Problem: In 1960, Congress passed the San Luis Act, authorizing the construction of and operation of the San Luis Unit as a part of CVP with the principal purpose of furnishing water for irrigation of land in Merced, Fresno, and Kings Counties, California. Any water project that brings fresh water to an agricultural area must take the salty subsurface water remaining after the crops have been irrigated away from the root zone, since too-shallow groundwater results in salt buildup in soils and reduces the productivity of farmland. For this reason, the San Luis Act expressly conditioned the construction of the San Luis Unit on the provision for drainage facilities. Although changes in cropping patterns and technological advances in irrigation practices have proven beneficial, the drainage problem within Westlands remains significant.

The United States has a Statutory and Court-Ordered Obligation to Manage Drainage

- The Ninth Circuit Court of Appeals has held that the San Luis Act requires the Secretary of the Interior to provide drainage to the San Luis Unit of the CVP. See *Firebaugh Canal Co. v. United States*, 203 F.3d 568 (9th Cir. 20 00). As a result, in 2000, a federal district court entered an order requiring the Secretary "shall, without delay, provide drainage to the San Luis Unit pursuant to the statutory duty imposed by section 1(a) of the San Luis Act."
- According to the Bureau of Reclamation, the cost to provide federal drainage service to the San Luis Unit is in excess of \$3.5 billion, when indexed for inflation.

Ongoing Litigation Regarding Drainage

- There are currently several court cases pending regarding the federal government's obligation to provide drainage to Westlands, including a putative class action brought by Westlands landowners in the United States Court of Federal Claims (*Etchegoinberry, et al. v. United States*, No.11-564L (Fed. Cl.)), alleging that the federal government's failure to provide drainage service to their lands effected a physical taking of their property without just compensation in violation of the Fifth Amendment.
- The U.S. estimates that federal liability for just compensation for these taking claims alone could range from zero to \$2 billion.





The Resolution Act, and Underlying Settlement Agreement, Will:

- Settle the above litigation and relieve the U.S. of its multi-billion dollar statutory and court-ordered drainage obligation
- Require Westlands to manage drainage water within its boundaries, in accordance with the federal and California law, and provide the Department of Interior the right to cease water deliveries to Westlands if it fails to do so
- Require Westlands to indemnify the U.S. for any damages and pay compensation for landowner claims arising out of the Etchegoinberry litigation
- Relieve Westlands of its existing approximate \$375 million capital repayment obligations under its water service contract with the United States
- Require Westlands to permanently retire 100,000 acres of land within its boundaries
- Authorize the Secretary of the Interior to convert Westlands' existing water service contract entered into under section 9(e) of the 1939 to a repayment contract under section 9(d) of the same act
- Cap Westlands contract deliveries at 75% of its CVP contract amount

The Resolution Act Will Not:

- Impact Delta water quality since no drainage water will be discharged outside of Westlands' boundaries
- Impact other CVP contractors.

***Northerly Districts Agreement:** The Bureau of Reclamation is in settlement discussions with the Northerly Districts to also settle a dispute concerning the federal government's obligation to provide drainage service to the districts. Since there is no Northerly Districts Agreement at this time, the reference to the districts is merely intended to serve a placeholder. It is anticipated that the parties will reach an agreement relatively soon.

Become a Cosponsor

Contact: Cole.Rojewski@mail.house.gov





San Luis Drainage Resolution Act

Section by Section

The San Luis Unit Drainage Resolution Act (the “Resolution Act”) would settle a long-standing dispute between the United States and the Westlands Water District (“Westlands”) concerning the management of drainage water within Westlands’ service area in the San Luis Unit of the Central Valley Project (CVP) in California. In doing so, it will save the American taxpayers billions of dollars.

Section by Section Analysis

Section 1; Short Title

Provides for the Short Title of the Act.

Section 2; Definitions

Defines various terms in the Act.

Section 3; Approval of Agreements

- a) Directs the Secretary of the Interior to implement the terms and conditions of the Westlands Agreement.
- b) Directs the Secretary of the Interior to the implement the terms and conditions of the Northerly Districts Agreement which is merely intended to serve as place holder language since there is no Northerly Districts Agreement. An agreement, however, may be reached relatively soon.

Section 4; Relief from Drainage Obligation

Amends the San Luis Act to relieve the U.S. of its drainage obligation under the San Luis Act.

Section 5; Drainage Implementation

Provides that Westlands shall be responsible for the management of drainage water within its boundaries, in accordance with federal and California law.

Section 6; Water Delivery Contracts

- a) Directs the Secretary of the Interior to convert Westlands’ existing water service contract entered into under section 9(e) of the 1939 to a repayment contract under section 9(d) of the same act.
- b) Requires the Secretary of the Interior to make allocation decisions in the Project consistent with federal law, including the Federal Endangered Species Act, Reclamation Law, and applicable California State Water Resources Control Board.
- c) Directs the Secretary of the Interior to enter into a 9(d) contract with the Secretary of the Navy for the delivery of CVP water to the Lemoore Naval Air Station.





Section 7; Repayment Obligations

- a) **Suspension of Capital Obligation:** Suspends Westlands' capital repayment obligation and payments under existing water service contracts and 1965 repayment contract between the U.S. and Westlands until the execution of the 9(d) repayment contract.
- b) **Relief of Capital Repayment Obligations:** Relieves Westlands of its capital repayment obligations under its 1963 and 1965 water service contract and water repayment contract respectively with the U.S. Also, the subsection provides that the repayment relief does not extend to Westlands' operation and maintenance obligations.
- c) **Applicability of Certain Provisions –** Provides that upon the discharge of the capital repayment obligations, the provisions of section 213(a) and (b) of the Reclamation Reform Act shall be deemed to apply to Westlands, and the ownership and full cost pricing limitations in any provision of Federal reclamation law shall not apply to lands in the District.

Section 8; Transfer of Title to Certain Facilities

Provides that the Secretary of the Interior shall transfer to Westlands certain facilities upon the execution of the 9(d) repayment contract, or as soon as practicable thereafter.

Section 9; Compliance with Applicable Law

Requires the Secretary of the Interior to comply with all applicable federal laws in implementing the agreement.

Section 10; No Water Supply or Financial Impacts on Central Valley Project Contractors

Provides that the implementation of the Act and the Agreements authorized thereunder shall have no water supply or financial impacts on any CVP contractors.

Section 11; Restoration Fund Payments by Westlands Water District

Requires that Westlands remain financially responsible for contributions to the CVP Restoration Fund in any year where allocation of water for south-of-Delta CVP long-term water service contractors or repayment contractors is greater than 75% in order to avoid shifting such payments from Westlands to CVP preference power contractors.



MP Region Public Affairs, 916-978-5100, <http://www.usbr.gov/mp>, October 2015

Westlands v. United States Settlement

Current Litigation/Background for Settlement

- In 2000, the court in *Firebaugh Canal Co v. United States*, issued an Order requiring the Secretary of the Interior to provide drainage service to lands served by the San Luis Unit of the Central Valley Project. In 2007 Reclamation signed a Record of Decision selecting a drainage plan and finding that the cost of providing drainage for lands served by the San Luis Unit would be approximately \$2.6 billion. The costs are now estimated at approximately \$3.5 billion using 2015 cost indices. Reclamation began implementing the selected drainage plan in a portion of Westlands Water District in 2010 on a court-ordered schedule; Reclamation estimates that it has approximately \$513 million (in 2015 dollars) remaining in available cost ceiling under the San Luis Act.
- In 2011, individual landowners within Westlands Water District filed a takings claim against the United States alleging that failure to provide drainage service has caused a physical taking of their lands without just compensation in violation of the Fifth Amendment. *Etchegoinberry v. United States*. The Court of Federal Claims denied the government's motion to dismiss the complaint. While the complaint does not specify a dollar amount for damages, estimates suggest that federal liability for just compensation could range from zero to over \$2 billion.
- In January 2012, Westlands filed a breach of contract case alleging that the government's failure to provide drainage service to the Westlands' service area constituted a breach of Westlands' 1963 Water Service and 1965 Repayment contracts (including the interim renewal of those contracts). The case is currently pending.

Reasons Settlement is in Best Interests of the United States

- Total cost exposure to the United States from the Firebaugh injunction is \$3.5 billion (\$513 million authorized), and potential liability in the Etchegoinberry takings litigation ranges from zero to more than \$2 billion.
- Failure to resolve litigation will require providing drainage to lands served by the San Luis Unit, which – at an estimated cost of \$3.5 billion (\$513 million authorized) – will have a significant impact on Reclamation's regional and national budget and potentially disrupt funding for other programs. Complicating matters is the risk that Reclamation could be ordered to provide this drainage service notwithstanding the congressionally authorized construction ceiling under the San Luis Act of 1960. Thus, in order to fully



U.S. Department of the Interior

Bureau of Reclamation

implement a drainage solution, there must be an amendment to the construction cost ceiling for the San Luis Unit. Current implementation of the Control Schedule for completion of only a portion of the preferred alternative will take over 10 years and is based on a steady stream of appropriations.

- Removal of the court order to provide drainage service will allow Reclamation to pursue other water-policy initiatives in California.
- There is the potential for significant financial exposure to the treasury in the *Etchegoinberry* litigation.

Proposed Terms of the Settlement

* Implementation of the Settlement is contingent upon congressional authorization of enabling legislation.*

Under the Proposed Terms of the Settlement, Westlands will:

- *Permanently retire not less than 100,000 acres of land from production.* Westlands will agree to permanently retire a total of *not less than* 100,000 acres of lands within its boundaries utilizing those lands only for the following purposes:
 - Management of drain water, including irrigation of reuse areas;
 - Renewable energy projects;
 - Upland habitat restoration projects; or
 - Other uses subject to the consent of the United States.
- *Cap contract deliveries at 75% of its CVP contract amount (from 1.193 million acre-feet to 895 thousand acre-feet).* Any water above this 75% cap, that would have been delivered to Westlands, would instead be available to the United States for other public purposes under the CVP.
- *Assume all responsibility for drainage in accordance with all legal requirements under state and federal law.* Westlands would become legally responsible for the management of drainage water within its boundaries, in accordance with federal and California law.
- *Indemnify the United States for any damages and pay compensation for claims arising out of the Etchegoinberry litigation.* Under the Settlement Westlands will indemnify the United States for any claims (past, present and future) arising out of a failure to provide drainage service with Westlands. Westlands would also intervene in the *Etchegoinberry* case for Settlement purposes and would pay compensation to individual landowners.
- *Continue to wheel water to Lemoore Naval Air Station.* As part of the overall Settlement, CVP water will be made available to Lemoore Naval Air Station and Westlands would

agree to wheel all CVP water made available to Lemoore under the same terms and conditions as Westlands wheels water to other Westlands' contractors.

- *Be relieved from potential drainage repayment.* If the United States were to expend significant funds to provide a drainage solution, Reclamation would seek repayment from Westlands (over 50 years, with no interest, commencing after completion of each separable element). By taking responsibility for drainage, Westlands would also eliminate responsibility for repayment.

Under the Terms of the Settlement, the United States will:

- *Be relieved of all statutory obligations to provide drainage.* The Settlement Agreement would relieve the Department of the Interior from all drainage obligations imposed by the San Luis Act, including implementation of the 2007 ROD, which is estimated to cost approximately \$3.5 billion (\$513 million authorized). Westlands will agree to dismiss with prejudice the *Westlands v. U.S.* breach of contract litigation and will join the U.S. in petitioning for *vacatur* of the 2000 Order Modifying Partial Judgment in the *Firebaugh* case directing implementation of drainage service and control schedules.
- *Receive a waiver of claims for potential damages due to a failure to provide drainage service.* Westlands will agree to provide for the release, waiver and abandonment of all past, present and future claims arising from the government's failure to provide drainage service under the San Luis Act, including those by individual landowners within Westlands' service area, and would further agree to indemnify the United States for any and all claims relating to the provision of drainage service or lack thereof within the Westlands service area.
- *Relieve Westlands repayment obligation for CVP construction charges to date (approximately \$375 million).* Westlands will be relieved of its current, unpaid capitalized construction costs for the CVP, the present value of which is currently estimated to be \$375 million. Under the Settlement, Westlands will still be responsible for Operation and Maintenance, the payment of restoration fund charges pursuant to the CVPIA, and for future CVP construction charges.
- *Convert Westlands water service contract into a repayment contract.* The Secretary will convert Westlands' current 9(e) water service contract to a 9(d) repayment contract consistent with existing key terms and conditions. As a "paid out" contractor, the benefit of this conversion is permanent right to a stated share of CVP water. However, the terms and conditions of the contract—including the so called "shortage clause" – will otherwise be the same as in the current 9(e) contract.
- *Retain the right to cease water deliveries if Westlands fails to meet its drainage obligation.* Language in the Settlement makes the United States' obligation to provide water to Westlands under the 9(d) Repayment Contract conditional upon Westlands' fulfillment of its obligations to manage drainage water within its service area.

- *Issue a water service contract to Lemoore Naval Air Station.* As part of the overall Settlement, the United States is authorized to enter into a water service contract with Lemoore Naval Air Station to provide a guaranteed quantity of CVP water to meet the needs of the Naval Air Station associated with air operations and Westlands will agree to wheel all CVP water made available to Lemoore.

How Will Westlands Manage Drainage?

Westlands will use a suite of measures to manage drain water. The mix of measures Westlands uses will depend on the varying needs within the drainage-impaired areas, and will evolve as conditions change. These measures to be used include elements identified in Reclamation's drainage plan, such as land retirement, source control through more efficient irrigation practices, and collection and reuse of shallow groundwater. It will also depend upon ongoing monitoring and regulation of groundwater under the Long Term Irrigated Lands Regulatory Program being administered by the Central Valley Regional Water Quality Control Board, which is described further below. Options available to Westlands may include: (1) Land Retirement; (2) Groundwater Management; (3) Source Control; (4) Regional Reuse Projects; (5) Drain Water Treatment; and (6) Salt Disposal. Westlands would also take title to certain facilities including the portion of the San Luis Drain that lies within Westlands' service area

What Happens if Westlands Fails to Manage Drain Water After the Settlement is Approved?

Westlands will be subject to all state and federal laws and regulations regarding its obligation to provide drainage and will be subject to those requirements under the Settlement. Nothing in the Settlement abrogates or interferes with existing or future state and federal authority over any discharges of drain water from Westlands' service area or groundwater quality. In addition, if Westlands fails to meet its drainage obligation, language in the Settlement makes the United States' obligation to provide water to Westlands under the 9(d) Repayment Contract conditional upon Westlands' fulfillment of its obligations to manage drainage water within its service area.

Settlement Concerns Raised by Third Parties

Concern: Westlands is receiving a permanent allocation of water. To appropriately address this concern it is important first to address Westlands' water service contracts **without** the Settlement, and then compare current contractual rights with Westlands' rights **under** the Settlement if authorized by Congress.

CONDITIONS NOW: Under section 1(4) of the Act of July 2, 1956, Westlands, like other CVP water service and repayment contractors, has a "first right" to a share of water developed as part of the Central Valley Project ("CVP"), expressed as a "right to renew" a Reclamation contract. This first right means that Reclamation does not offer CVP water that is under current contract (either water service or repayment) to other potential users until the contractor has declined to contract for that water. Westlands' current interim contract reflects this concept, subject to certain terms and conditions, by providing a right to renew. Examples of such terms and conditions are:

- Reasonable and beneficial use as defined in state and federal Reclamation law;
- Payment of all operations, maintenance, capital, and other applicable charges appropriately allocated to Westlands;
- Other obligations being met within the Central Valley Project, including other contract priorities and any other applicable requirements of state and federal law, such as the federal Endangered Species Act.

Under current law, Westlands is required to repay the remaining capital allocated to it as part of constructing the CVP by 2030. Once this capital is paid out and appropriate federal accounting certifications are complete, Westlands would (1) no longer be subject to certain provisions of the federal Reclamation Reform Act; and (2) its “first right” to a share of CVP water would become what is called by law a “permanent right” to the same share. This permanent right would still be subject to terms and conditions of a contract with the United States, and would still be subject to limitations on CVP operations under applicable state and federal law.

CONDITIONS WITH SETTLEMENT: The following are the only changes from the current water service contract to a new repayment contract with Westlands, entered into under § 9(d) of the 1939 Reclamation Project Act, that would occur if the Settlement is authorized by Congress and signed into law:

- The capital costs of the CVP allocated to Westlands would be considered paid out. Thus, the benefits that would have otherwise been available to Westlands starting in 2030, would become available upon passage of the legislation;
- All terms and conditions that apply to the delivery of water to Westlands will still apply, AND two additional conditions would be added to a new repayment contract, as follows:
 1. Water deliveries to Westlands would be conditioned on fulfillment of its obligation to manage drainage water within its boundaries, and consistent with federal and state law; and
 2. Although the contractual share of CVP water available to Westlands is, and will continue to be, 1,193,000 acre feet, actual deliveries of water to Westlands will not exceed 895,000 acre feet, and Westlands agrees that any CVP water available in excess of 895,000 to which it may otherwise be entitled absent the Settlement, would be available to the Secretary to use for any other authorized purpose.

Concern: The contract quantity is still too large. Westlands is agreeing to a 25% reduction in deliveries as the maximum amount allowed under its contract. It is important to note this is the maximum delivery amount allowed under the contract. Westlands is still subject to beneficial use requirements under state law.

Concern: The United States is forgoing an opportunity to further relieve stress on the Delta by failing to demand additional cuts in water supply under the Settlement. Water exports will not increase based on the Settlement. The Settlement specifically avoids giving Westlands any greater rights to an annual allocation of water than Westlands would have had if the 9(e) water service contract had remained in place. Westlands is also subject to state law requirements for beneficial use, and may decide to retire additional lands as a means of managing drainage water.

Concern: The Settlement mandates insufficient land retirement. The Settlement secures the permanent retirement of lands now largely owned by Westlands; absent the Settlement, lands acquired by Westlands but currently fallowed could be brought back into production in the future. However, the land retirement requirement of 100,000 acres under the Settlement is not a cap on land retirement. Westlands will be able to target the acquisition and retirement of additional drainage-impacted lands to address local conditions and without the distorting effects of higher mandated retirement acreage on land prices.

Concern: The debt forgiveness is inappropriate. Under the terms of the Settlement Westlands is receiving debt forgiveness on past construction obligations for features of the CVP which amounts to approximately \$375 million. Westlands is receiving this in return for undertaking the drainage obligation, which if implemented by the United States would cost in excess of \$3.5 billion (\$513 million authorized), and for indemnifying the United States against future drainage claims. In addition, Westlands will still be responsible for any future repayment obligation associated with new features of the CVP.

Concern: No acreage limitation. As is allowed under current law, Westlands will be relieved of acreage limitations and full cost pricing under the Reclamation Reform Act. This is consistent with the capital repayment relief afforded Westlands under the Settlement.

Concern: How are other CVP water contractors and rate payers protected from increased rates as a result of the debt forgiveness? The Settlement protects other contractors from any shift in costs and specifically mandates that Westlands will continue to pay operation, maintenance and replacement costs in addition to any future new construction costs. Specifically, paragraph 17 of the Settlement provides that “[i]mplementation of the provisions of this Agreement shall not alter the repayment obligation of any other long-term water service or repayment contractor receiving water from the Central Valley Project, or shift any costs to other such contractors that would otherwise have been properly assignable to Westlands absent this action, including operations and maintenance costs, construction costs, or other capitalized costs to Westlands after the date of this Agreement.”

The Settlement further provides in section 9(c)(v) “the repayment relief afforded to Westlands in subsection (iv) shall not extend to Westlands’ operation, maintenance and replacement obligations...or to construction costs or other capitalized costs not yet allocated to or incurred by Westlands as of the date of this Agreement....

Concern: Delta water quality will be impacted as a result of the Settlement. Delta water quality will not be impacted by the Settlement Agreement. Currently, Westlands does not discharge subsurface drainage water outside of its boundaries. Under the Settlement Agreement, Westlands will be obligated to manage drain water within its boundaries and will not be

permitted to discharge drainage to the Delta. Also, under the Settlement Agreement, Westlands' management of drainage water will continue to be regulated under current state and federal laws. Ultimately, if Westlands does not comply with its obligation to manage drain water, under the terms of the Settlement, its water supply can be cut off.

.....
(Original Signature of Member)

114TH CONGRESS
2D SESSION

H. R.

To affirm an agreement between the United States and Westlands Water
District dated September 15, 2015, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. VALADAO introduced the following bill; which was referred to the
Committee on

A BILL

To affirm an agreement between the United States and
Westlands Water District dated September 15, 2015,
and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.— This Act may be cited as the
5 “San Luis Unit Drainage Resolution Act”.

6 (b) TABLE OF CONTENTS.—The table of contents for
7 this Act is:

Sec. 1. Short title; table of contents.
Sec. 2. Definitions.

- Sec. 3. Approval of agreements.
- Sec. 4. Relief from drainage obligation.
- Sec. 5. Drainage implementation.
- Sec. 6. Water delivery contracts.
- Sec. 7. Repayment obligations.
- Sec. 8. Transfer of title to certain facilities.
- Sec. 9. Compliance with applicable law.
- Sec. 10. No water supply or financial impacts on other Central Valley Project contractors.
- Sec. 11. Restoration fund payments by Westlands Water District.

1 **SEC. 2. DEFINITIONS.**

2 In this Act:

3 (1) NORTHERLY DISTRICTS AGREEMENT.—The
4 term “Northerly Districts Agreement” means the
5 Agreement among the United States, San Luis
6 Water District, Panoche Water District, and
7 Pacheco Water District.

8 (2) PROJECT.—The term “Project” means the
9 Central Valley Project, owned by the United States
10 and managed by the Department of the Interior,
11 Bureau of Reclamation.

12 (3) PROJECT WATER.—The term “Project
13 Water” means all water that is developed, diverted,
14 stored, or delivered by the Secretary in accordance
15 with the statutes authorizing the Project and in ac-
16 cordance with the terms and conditions of water
17 rights acquired pursuant to California law.

18 (4) REPAYMENT CONTRACT.—The term “repay-
19 ment contract” means the repayment contract con-
20 verted under section 6(a).

1 (5) SAN LUIS ACT.—The term “San Luis Act”
2 means the Act of June 3, 1960 (Public Law 86–
3 488), and all Acts amendatory thereof and supple-
4 mentary thereto.

5 (6) SAN LUIS UNIT.—The term “San Luis
6 Unit” means those lands identified in section 1 of
7 the San Luis Act.

8 (7) SAN LUIS UNIT CONTRACTORS.—The term
9 “San Luis Unit Contractors” means Westlands
10 Water District (including Broadview Water District
11 lands annexed within Westlands Water District),
12 San Luis Water District, Panoche Water District,
13 and Pacheco Water District.

14 (8) SECRETARY.—The term “Secretary” means
15 the Secretary of the Interior.

16 (9) WESTLANDS AGREEMENT.—The term
17 “Westlands Agreement” means the “Agreement be-
18 tween the United States and Westlands Water Dis-
19 trict” to settle litigation concerning the United
20 States’ duty to provide drainage service, entered
21 September 15, 2015.

22 **SEC. 3. APPROVAL OF AGREEMENTS.**

23 Notwithstanding any other provision of law, unless
24 otherwise specified herein, the Secretary is hereby directed

1 to implement the terms and conditions of the Westlands
2 Agreement and the Northerly Districts Agreement.

3 **SEC. 4. RELIEF FROM DRAINAGE OBLIGATION.**

4 The San Luis Act is amended as follows:

5 (1) In the first section—

6 (A) in the second sentence, by striking
7 “distribution systems, drains,”; and

8 (B) in the sixth sentence—

9 (i) by striking “the Secretary has (1)”
10 and inserting “the Secretary has”; and

11 (ii) by striking “, and (2) received”
12 and all that follows through “December,
13 17, 1956”.

14 (2) In section 5, by striking the first sentence
15 and inserting “Notwithstanding any other provision
16 of law, the Secretary of the Interior shall have no
17 duty to provide drainage or drainage service to the
18 San Luis Unit. Each contractor within the San Luis
19 Unit that receives water for the purpose of irrigation
20 shall be responsible for the management of drainage
21 water within its boundaries, in accordance with Fed-
22 eral and California law consistent with the
23 Westlands Agreement and Northerly District Agree-
24 ment respectively.”.

25 (3) In section 8—

1 (A) in the first sentence, by striking “other
2 than distribution systems and drains,”; and
3 (B) in the third sentence—
4 (i) by striking “(a) for construction”
5 and all that follows through “ and (b)”;
6 and
7 (ii) by striking “: *Provided*” and all
8 that follows through “such works are
9 placed in service”.

10 **SEC. 5. DRAINAGE IMPLEMENTATION.**

11 (a) IN GENERAL.—The Westlands Water District
12 shall assume all legal responsibility for the management
13 of drainage water within its boundaries in accordance with
14 Federal and California law, and in accordance with the
15 Westlands Agreement.

16 (b) DRAIN WATER.—Westlands Water District shall
17 not discharge drain water outside of its boundaries.

18 **SEC. 6. WATER DELIVERY CONTRACTS.**

19 (a) CONTRACT CONVERSION.—The Secretary shall
20 convert the Westlands Water District existing long-term
21 or interim renewal water service contract entered into
22 under section 9(e) of the Act of August 4, 1939 (53 Stat.
23 1196), to a repayment contract under section 9(d) and
24 9(c)(1) of the Act of August 4, 1939 (53 Stat. 1195,
25 1194) consistent with the Westlands Agreement.

1 (b) ALLOCATION DECISIONS.—

2 (1) IN GENERAL.—Notwithstanding subsection
3 (a) and as provided in the Westlands Agreement, the
4 Secretary shall make allocation decisions in the
5 Project consistent with the requirements of Federal
6 law (including the Endangered Species Act of 1973
7 and Reclamation law) and applicable California
8 State Water Resources Control Board requirements.

9 (2) CONVERSION OF CONTRACT.—Conversion of
10 Westlands Water District's contract pursuant to
11 subsection (a) shall not afford Westlands Water Dis-
12 trict greater or lesser rights to an annual allocation
13 of Project Water than Westlands Water District had
14 before that conversion.

15 (3) LIMITATION ON LIABILITY.—No liability
16 shall accrue against the United States or any of its
17 officers, agents, or employees for any damage, direct
18 or indirect, arising from a condition of shortage in
19 the amount of water available for delivery to the San
20 Luis Unit Contractors caused by—

21 (A) errors in physical operations of the
22 Project;

23 (B) physical causes beyond the control of
24 the Contracting Officer, including drought; or

1 (C) actions taken by the Contracting Offi-
2 cer to meet legal obligations.

3 (c) WATER SERVICE CONTRACT FOR LEMOORE
4 NAVAL AIR STATION.—

5 (1) CONTRACT REQUIRED.—The Secretary shall
6 enter into a contract under section 9(e) of the Act
7 of August 4, 1939 (53 Stat. 1196), with the Sec-
8 retary of the Navy for the delivery of Project Water
9 to the Lemoore Naval Air Station to meet the irriga-
10 tion needs of Lemoore Naval Air Station associated
11 with air operations. The contract amount of Project
12 Water made available to the Lemoore Naval Air Sta-
13 tion under such contract shall be determined by the
14 Secretary through technical analysis with the
15 Lemoore Naval Air Station.

16 (2) CONDITION OF SHORTAGE.—In any year in
17 which there may occur a condition of shortage in the
18 amount of water available for delivery, the Con-
19 tracting Officer shall allocate the available Project
20 Water amount to Lemoore Naval Air Station in ac-
21 cordance with the allocation steps for municipal and
22 industrial water service contractors under the Cen-
23 tral Valley Project Municipal and Industrial Water
24 Shortage Policy (as in effect on the effective date of
25 the repayment contract). For purposes of deter-

1 mining “historical use” under the policy, past water
2 use for irrigation needs by the Lemoore Naval Air
3 Station under the contract authorized by this section
4 or such use previous to the contract may be consid-
5 ered.

6 **SEC. 7. REPAYMENT OBLIGATIONS.**

7 (a) SUSPENSION OF CAPITAL OBLIGATION.—
8 Westlands Water District’s capital repayment obligation
9 and payments under its water service contracts and the
10 April 1, 1965, repayment contract between the United
11 States and Westlands Water District (contract numbered
12 14–06–200–2020–A) as further defined in subsection (b),
13 is suspended until the execution of the repayment con-
14 tract. Upon execution of that repayment contract,
15 Westlands Water District shall receive a credit against fu-
16 ture operation and maintenance costs payable to the
17 United States in the amount of the capital costs under
18 the water service contracts and the 1965 Repayment Con-
19 tract paid by Westlands Water District between the date
20 of the Westlands Agreement and the date of the enact-
21 ment of this Act. Costs incurred by the United States for
22 revaluating, planning, or providing drainage service to
23 Westlands Water District shall be non-reimbursable, as
24 set forth in paragraph (9)(C)(iv) of the Westlands Agree-
25 ment.

1 (b) RELIEF OF CAPITAL REPAYMENT OBLIGA-
2 TIONS.—Upon the date of execution of the repayment con-
3 tract, and as set forth in the Westlands Agreement, the
4 following shall take effect:

5 (1) IN GENERAL.—Westlands Water District
6 shall be relieved of—

7 (A) its capital repayment obligations under
8 the June 5, 1963, water service contract be-
9 tween the United States and Westlands Water
10 District (contract number 14–06–200–495–A)
11 providing for water service, or any renewals
12 thereof, and any water service contracts as-
13 signed to Westlands Water District, Westlands
14 Distribution District No. 1, and Westlands Dis-
15 tribution District No. 2 existing as of the date
16 of the execution of the Westlands Agreement;
17 and

18 (B) any remaining repayment obligation
19 under the April 1, 1965, repayment contract
20 between the United States and Westlands
21 Water District (contract numbered 14–06–200–
22 2020–A).

23 (2) LIMITATION ON RELIEF.—Repayment relief
24 granted in paragraph (1) shall not extend to—

1 (A) Westlands Water District's operation
2 and maintenance obligations, whether payable
3 to the United States or to an Operating Non-
4 Federal Entity;

5 (B) construction costs or other capitalized
6 costs not yet allocated to or incurred by
7 Westlands Water District as of the date of the
8 Westlands Agreement, including costs attrib-
9 utable to the Folsom Safety of Dams modifica-
10 tions, the B.F. Sisk corrective action study, or
11 any Safety of Dams; or

12 (C) the repayment of future capital costs
13 incurred after the date of execution of the
14 Westlands Agreement.

15 (c) REPAYMENT OF COSTS.—Central Valley Project
16 construction costs or other capitalized costs allocated to
17 Westlands Water District after the date of the Westlands
18 Agreement, and properly assignable to Westlands Water
19 District, shall be repaid in not more than 5 years after
20 notification of the allocation of such amount of less than
21 \$5,000,000. If such amount is \$5,000,000 or greater, such
22 cost shall be repaid as provided by applicable Reclamation
23 law. Any additional costs that may have been assigned to
24 Westlands Water District pursuant to paragraph
25 (9)(C)(iv) of the Westlands Agreement related to the Cen-

1 tral Valley Project final cost allocation shall be non-reim-
2 bursable.

3 (d) APPLICABILITY OF CERTAIN PROVISIONS.—

4 (1) RECLAMATION REFORM ACT.—Upon dis-
5 charge of the capital repayment obligation as pro-
6 vided in subsection (b), the provisions of section
7 213(a) and (b) of the Reclamation Reform Act of
8 1982 (96 Stat. 1269) shall be deemed to apply to
9 lands in Westlands Water District, and the owner-
10 ship and full cost pricing limitations in any provision
11 of Federal reclamation law shall not apply to lands
12 in the District notwithstanding the subsequent allo-
13 cation of construction costs or other capitalized costs
14 to the District. These exemptions shall be carried
15 out in accordance with the process set forth in the
16 Westlands Agreement.

17 (2) OTHER PROVISIONS.—Nothing in this Act is
18 intended to relieve the San Luis Unit Contractors of
19 any other obligations under Reclamation Law in-
20 cluding Restoration Fund charges pursuant to sec-
21 tion 3407(d) of Public Law 102–575.

22 **SEC. 8. TRANSFER OF TITLE TO CERTAIN FACILITIES.**

23 (a) IN GENERAL.—Upon the execution of the repay-
24 ment contract, or as soon thereafter as practicable, the

1 Secretary shall transfer to Westlands Water District title
2 to the following:

3 (1) San Luis Canal System, excluding the main
4 canal that is integrated with the California Aque-
5 duct. These appurtenant features include—

6 (A) internal water distribution system
7 within Westlands, including approximately
8 1,045 miles of buried pipeline;

9 (B) pumping plants within Westlands, in-
10 cluding—

11 (i) San Luis Canal Left and Right
12 Bank pumping plants;

13 (ii) Pumping Plants P1 through P38
14 located at the head end of the gravity
15 laterals to supply the head required for the
16 “P” laterals;

17 (iii) Pumping Plants, tanks, res-
18 ervoirs, relift pumping plants to serve
19 lands west of the San Luis Canal; and

20 (iv) Pumping Plant 7.05 off Lateral
21 7; and

22 (C) related structures, appurtenances,
23 pumping plants, pumps, motors, meters, valves,
24 tanks, transformers, and electrical equipment
25 as specifically identified through the title trans-

1 fer process of federally owned facilities, equip-
2 ment, and real property.

3 (2) Mendota Pool diversion facilities operated
4 by Westlands Water District System, including the
5 following:

6 (A) Inlet Canal from the Fresno Slough.

7 (B) Pumping plants, 6-1, 6-2, 7-1, 7-2.

8 (C) Related structures, appurtenances,
9 pumps, motors, meters, valves, tanks, trans-
10 formers, and electrical equipment as specifically
11 identified through the title transfer process of
12 federally owned facilities, equipment, and real
13 property.

14 (3) Pleasant Valley System, including the fol-
15 lowing:

16 (A) Intake canal and pipeline.

17 (B) Pleasant Valley Pumping Plant.

18 (C) Coalinga Canal, including related
19 check structures, turnouts, and headworks.

20 (D) Pleasant Valley distribution system
21 and pumping plants along the Coalinga Canal.

22 (E) Related structures, appurtenances,
23 pumps, motors, meters, valves, tanks, trans-
24 formers, and electrical equipment as specifically
25 identified through the title transfer process of

1 federally owned facilities, equipment, and real
2 property.

3 (4) Drainage collection system, including the
4 following:

5 (A) Carrier and collector pipelines, sumps,
6 and sump pumps.

7 (B) San Luis Drain from Sta 6678+45 to
8 Sta 8520+22.87. (Crossing with DMC to La-
9 guna Ave crossing.)

10 (C) Related structures, appurtenances,
11 pumps, motors, meters, valves, tanks, trans-
12 formers, and electrical equipment as specifically
13 identified through the title transfer process of
14 federally owned facilities, equipment, and real
15 property.

16 (5) Tranquillity Field Office, including the fol-
17 lowing:

18 (A) Buildings at 32650 West Adams Ave-
19 nue, Tranquillity, CA 93668.

20 (B) All related fixtures and furnishings as
21 specifically identified through the title transfer
22 process of federally owned facilities, equipment,
23 and real property.

24 (6) Huron field office, including the following:

1 (A) Buildings at 32450 South Lassen Ave-
2 nue, Huron, CA 93234.

3 (B) All related fixtures and furnishings as
4 specifically identified through the title transfer
5 process of federally owned facilities, equipment,
6 and real property.

7 (7) All real property interests held by the
8 United States in lands underlying or otherwise asso-
9 ciated with the facilities and equipment listed in this
10 subsection (a), including all fee title, easements, and
11 rights of way.

12 (b) PAYMENT OF COSTS.—Except as specifically pro-
13 vided in this Act, any transfer of title to the Pleasant Val-
14 ley Pumping Plant, the Coalinga Canal, and any associ-
15 ated facilities shall not relieve any other Project Water
16 service or repayment contractor of the requirement to pay
17 any allocated costs associated with those conveyance or
18 pumping facilities that are properly allocated to those con-
19 tractors under existing law and Project ratesetting poli-
20 cies.

21 (c) LIABILITY ON TRANSFER OF TITLE.—Upon
22 transfer of title to any facilities pursuant to subsection
23 (a), Westlands Water District shall, as a condition to such
24 transfer, formally agree as of the date of transfer to—

1 (1) hold the United States harmless and indem-
2 nify the United States for any and all claims, cost,
3 damages, and judgments of any kind arising out of
4 any act, omission, or occurrence relating to the
5 transferred facilities, except for such claims, costs,
6 damages arising from acts of negligence committed
7 by the United States or by its employees, agents, or
8 contractors, prior to the date of title transfer, for
9 which the United States is found liable under the
10 Federal Tort Claims Act; and

11 (2) assume full responsibility for correcting and
12 financing any repairs or deficiencies that may exist
13 at the time of or following title transfer.

14 (d) COMPLIANCE.—The Secretary and Westlands
15 Water District shall comply with all applicable require-
16 ments under Federal and California law before title to a
17 facility is transferred pursuant to this section.

18 **SEC. 9. COMPLIANCE WITH APPLICABLE LAW.**

19 In implementing the measures authorized by this Act,
20 the Secretary shall comply with all applicable Federal
21 laws, rules, and regulations, including the National Envi-
22 ronmental Policy Act of 1969 (42 U.S.C. 4321 et seq.)
23 and the Endangered Species Act of 1973 (16 U.S.C. 1531
24 et seq.), as necessary.

1 **SEC. 10. NO WATER SUPPLY OR FINANCIAL IMPACTS ON**
2 **OTHER CENTRAL VALLEY PROJECT CON-**
3 **TRACTORS.**

4 Implementation of this Act and the Agreements au-
5 thorized thereunder shall not—

6 (1) result in the involuntary reduction in the
7 contract water allocation to any Central Valley
8 Project long-term water service, repayment, settle-
9 ment, exchange, or refuge contractor, including con-
10 tractors in the Friant Division of the Central Valley
11 Project;

12 (2) modify, amend or affect any of the rights
13 and obligations of the parties to any Central Valley
14 Project long-term water service, repayment, settle-
15 ment, exchange, or refuge contract, including con-
16 tracts in the Friant Division of the Central Valley
17 Project; or

18 (3) alter the repayment obligation of any long-
19 term water service, repayment, or settlement con-
20 tractor receiving water or power from the Central
21 Valley Project, or shift any costs to other such con-
22 tractors that would otherwise have been properly as-
23 signable to San Luis Unit Contractors under this
24 Act, including operations and maintenance costs,
25 construction costs, or other capitalized costs allo-

1 cated to San Luis Unit Contractors after the date
2 of this Act.

3 (4) Impair the ability of the United States to
4 implement Paragraph 16 (The Water Management
5 Goal) of the Stipulation of Settlement entered by the
6 parties to *Natural Resources Defense Council, et al.*
7 *v. Rogers, et al.*, (Case NO CIV S-88-1658 (LKK/
8 GGH) E.D.Cal.) dated September 13, 2006, as au-
9 thorized to be implemented by title X of Public Law
10 111-11.

11 (5) Diminish, impair, or otherwise affect in any
12 manner any priorities for the allocation, delivery, or
13 use of water under applicable law, including any
14 purposes of use and priorities established by sections
15 3402 and 3406 of the Central Valley Project Im-
16 provement Act (Public Law 102-575; 106 Stat.
17 4706).

18 **SEC. 11. RESTORATION FUND PAYMENTS BY WESTLANDS**
19 **WATER DISTRICT.**

20 For the purpose of avoiding a shift of Central Valley
21 Project Restoration Fund payments from Westlands
22 Water District to Central Valley Project preference power
23 contractors, for any year in which the allocation of water
24 for south-of-Delta Central Valley Project long-term water
25 service contractors or repayment contractors is greater

1 than 75 percent, the Secretary shall calculate for
2 Westlands Water District a per acre foot Restoration
3 Fund payment based on a projection that Westlands
4 Water District would take delivery of the allocation made
5 to south-of-Delta Central Valley Project long-term water
6 service contractors or repayment contractors.

From: Bernhardt, David L.
Sent: Tuesday, February 2, 2016 3:04 PM
To: Johnny Amaral (jamaral@westlandswater.org); Thomas W. Birmingham (tbirmingham@westlandswater.org)
Subject: FW: Feb. 10: Predation Hearing

FYI

From: Petersen, Scott [mailto:Scott.Petersen@mail.house.gov]
Sent: Tuesday, February 02, 2016 4:37 PM
To: Steve Chedester (stevechedester@sjrecwa.net); Jason Phillips ; Jason Peltier; John Sweigard; David Orth; Ricardo Ortega - Grasslands
Cc: Wainwright, Matt; Ara Azhderian; Melissa Poole - Wonderful; Bernhardt, David L.; Joe Raeder (JRaeder@tfgnet.com); Nancy Williams
Subject: Feb. 10: Predation Hearing

Good afternoon all -- I was just made aware that Will Stelle will be testifying at the predation focused hearing on February 10th, so if you all have any questions that you'd like drafted or submitted, please make sure to get them to me by the end of the week or early next week at the latest. If you could please ensure this gets to your respective General Managers and the team on this, I'd greatly appreciate it.

As always, I'm available for you all anytime.

Best, Scott

J. Scott Petersen, P.E.

Deputy Chief of Staff
Rep. Jim Costa (CA-16)
1314 Longworth House Office Building
Washington, DC 20515
(202) 225-3341

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From: Bernhardt, David L.

Sent: Wednesday, February 3, 2016 7:09 AM

To: Johnny Amaral (jamaral@westlandswater.org); Thomas W. Birmingham (tbirmingham@westlandswater.org); Jason Peltier

Subject: FW: MEDIA ADIVOSRIY: Subcommittee Announces Hearing on Native and Endangered Fish Regulations

FYI. I think most of you are already aware of this hearing, but it was just noticed.

From: Natural Resources Press Office [mailto:naturalresourcesrepublicans@mail.house.gov]

Sent: Wednesday, February 03, 2016 9:05 AM

To: Natural Resources Press Office

Subject: MEDIA ADIVOSRIY: Subcommittee Announces Hearing on Native and Endangered Fish Regulations



FOR IMMEDIATE RELEASE
Wednesday, February 3, 2016

CONTACT: [Elise Daniel](#)
202-226-9019

MEDIA ADVISORY:

WASHINGTON, D.C. – On
Wednesday, February 10, 2016,
at 10:00 AM, in 1334 Longworth
House Office Building, the
Subcommittee on Water, Power
and Oceans will hold an oversight
hearing titled, *“The Costly Impacts of Predation and Conflicting Federal Statutes on Native and Endangered Fish Species.”*

Subcommittee on Water, Power and Oceans to Hold Oversight Hearing on the Costly Impacts of Predation and Conflicting Federal Statutes on Native and Endangered Fish Species

WHAT: Subcommittee on Water, Power and Oceans holds an oversight hearing *“The Costly Impacts of Predation and Conflicting Federal Statutes on Native and Endangered Fish Species”*

WHEN: Wednesday, February 10
10:00 AM

WHERE: 1334 Longworth House Office Building

Visit the [Committee Calendar](#) for additional information, once it is made available. The meeting is open to the public and a live video stream will be broadcast at [House Committee on Natural Resources](#).

Contact: Committee Press Office 202-226-9019

###

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From: Johnny Amaral
Sent: Friday, February 5, 2016 8:00 AM
To: Tom Birmingham; David Bernhardt
Subject: Fwd: CVP/SWP pumping

Best,

Johnny Amaral

Begin forwarded message:

From: "Larrabee, Jason" <Jason.Larrabee@mail.house.gov>
Date: February 4, 2016 at 2:12:34 PM PST
To: Ara Azhderian <ara.azhderian@sldmwa.org>, Kenneth Rooney <Kenneth_Rooney@feinstein.senate.gov>, "Lombardi, Kyle" <Kyle.Lombardi@mail.house.gov>, "Dunklin, Kristina" <Kristina.Dunklin@mail.house.gov>, "Petersen, Scott" <Scott.Petersen@mail.house.gov>
Cc: Johnny Amaral <jamaral@westlandswater.org>, Dennis Cardoza <dcardoza@foley.com>
Subject: RE: CVP/SWP pumping

Fresno Bee, **February 11, 2014**

The 31-page Senate measure introduced Tuesday offers \$300 million in drought aid through a variety of programs. It tries to wring out more water for users, in part by requiring "flexibility" in how federal officials manage pumping through the Sacramento-San Joaquin River Delta. It allows stricken water districts to delay their federal contract payments and speeds up federal decision-making on water supply projects.

"The bill does not waive the Endangered Species Act, or any other law," Feinstein said. "It essentially adds increased flexibility to the system."

From: Ara Azhderian [<mailto:ara.azhderian@sldmwa.org>]
Sent: Thursday, February 04, 2016 4:54 PM
To: Kenneth Rooney; Lombardi, Kyle; Larrabee, Jason; Dunklin, Kristina; Petersen, Scott
Cc: Johnny Amaral; Dennis Cardoza
Subject: CVP/SWP pumping

Hi all,

Reclamation is saying to expect a step increase in pumping tomorrow with the aim of -3,500 cfs OMR by Saturday, reevaluate on Monday, depending upon undefined conditions.

The intent is good, but it's maddening... there is essentially no operating criteria whatsoever, and while we lose water forever over perceived risk, Folsom goes into flood control operations...

So, for the folks that have dismissed the regulatory impacts in the past and have tried to chalk up 0% supplies to drought, what are they saying now?

a

From: Bernhardt, David L.
Sent: Friday, February 5, 2016 1:23 PM
To: Johnny Amaral (jamaral@westlandswater.org)
Subject: Monday call

I will be unable to participate in the 1 pm call on Monday.

David

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From: Johnny Amaral
Sent: Friday, February 5, 2016 2:31 PM
To: Bernhardt, David L.
Subject: Re: Monday call

Slacker

Best,

Johnny Amaral

On Feb 5, 2016, at 12:22 PM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

I will be unable to participate in the 1 pm call on Monday.

David

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From: Johnny Amaral
Sent: Monday, February 8, 2016 3:31 PM
To: David Bernhardt
Subject: Difi bill intro?

Best,

Johnny Amaral

From: Bernhardt, David L.
Sent: Monday, February 8, 2016 5:38 PM
To: Johnny Amaral
Subject: Re: Difi bill intro?

Nope

David Bernhardt

> On Feb 8, 2016, at 5:31 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

>

>

>

> Best,

>

> Johnny Amaral

>

>

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From: DCardoza@foley.com

Sent: Tuesday, February 9, 2016 4:37 AM

To: Jason Peltier (jason.peltier@sldmwa.org); ara.azhderian@sldmwa.org; Thomas W. Birmingham (tbirmingham@westlandswater.org); Rick Gilmore (r.gilmore@bbid.org)

Subject: FW: Obama Administration ESA Final Rules

Attachments: Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat.pdf; Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat.pdf; Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act.pdf; FWS Press Release 02 05 16.pdf; CBD ESA Press Release 02 05 16.pdf

David Bernhardt pointed this out to me yesterday and I wanted you all to have the information. Outrageous over-reach! Will make everything vulnerable to the whims of the biologists. Dennis

From: Thomas Jr , John B.

Sent: Monday, February 08, 2016 4:20 PM

To: Cardoza, Dennis A.

Subject: Obama Administration ESA Final Rules

On Friday, the Obama Administration released two final rules and one policy addressing critical habitat under the ESA. They are attached, along with press releases from FWS and the Center for Biological Diversity.

I am including a brief overview from Law360 below.

John

Feds Unveil Overhaul To Critical Habitat Regulations

Share us on: By **Keith Goldberg**

Law360, New York (February 5, 2016, 4:42 PM ET) -- Federal fish and wildlife regulators unveiled final regulations on Friday overhauling how they implement critical habitat designation requirements under the Endangered Species Act, a move blasted by environmentalists as a giveaway to oil and gas, mining and logging industries.

The U.S. [Fish and Wildlife Service](#) and the [National Oceanic and Atmospheric Administration's National Marine Fisheries Service](#) finalized [two joint, interrelated rules](#) regarding the implementation of sections 4 and 7 of the ESA, as well as a draft policy concerning critical habitat designations. The agencies claim the revisions will make the process more efficient, transparent and predictable.

"These commonsense administrative improvements are the product of an open and interactive public process that solicited feedback from diverse stakeholders," Gary Frazer, the FWS' assistant director for ecological services, said in a statement Friday. "Ultimately, they will better equip us to protect our nation's wildlife."

One rule revises the definition of "destruction or adverse modification" of a critical habitat to clarify "the value of critical habitat for the conservation of a listed species," as well as physical and biological features of a habitat "essential to the conservation of a listed species." The previous definition was invalidated by the D.C. Circuit in 2004, but regulators believe the rule won't be any more or less protective of critical habitats.

The other rule clarifies procedures and standards used for designating critical habitats, including clarifying designation criteria and better describing the scope and purpose of critical habitats, the agencies said. The draft policy describes the general position of the agencies for considering different situations relative to its process of excluding certain areas from critical habitat designations, such as voluntary conservation agreements, national security and economic impacts.

“These regulations are meant to clarify expectations and provide for credible and predictable designation and consultation processes, which improve our ability to conserve and recover imperiled species,” Donna Wieting, who directs the NMFS' office of protected resources, said in a statement Friday.

Experts have predicted challenges to the rules and policy from stakeholders on all sides, as they grapple over the legal boundaries of critical habitat.

The [Center for Biological Diversity](#), for one, ripped the rule revising the “destruction or adverse modification” definition. It claimed the rule allows development activities in critical habitats for endangered species as long as the activities aren’t determined to impact all of a species’ designated critical habitat, which amounts to “death-by-a-thousand-cuts” for endangered species.

“This regulation is nothing more than a giveaway to powerful special interests like the oil and gas, timber and mining industries,” Brett Hartl, the endangered species policy director at the Center for Biological Diversity, said in a statement Friday. “You can’t protect and recover endangered species without protecting the places they live.”

John B. Thomas Jr
Public Affairs Coordinator

Foley & Lardner LLP
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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 402

[Docket No. FWS–R9–ES–2011–0072]

RIN 1018–AX88

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

[Docket No. 120106026-4999-03]

RIN 0648-BB80

Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat

AGENCIES: U.S. Fish and Wildlife Service, Interior; National Marine Fisheries

Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), collectively referred to as the “Services” or “we,” revise a regulatory definition that is integral to our implementation of the Endangered Species Act of 1973, as amended (Act or ESA). The Act requires Federal agencies, in consultation with and with the assistance of the Services, to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. On May 12, 2014,

we proposed to revise the definition for “destruction or adverse modification” in our regulations as this definition had been found to be invalid by two circuit courts. In response to public comments received on our proposed rule, we have made minor revisions to the definition. This rule responds to section 6 of Executive Order 13563 (January 18, 2011), which directs agencies to analyze their existing regulations and, among other things, modify or streamline them in accordance with what has been learned.

DATES: Effective [*Insert date 30 days after the date of publication in the Federal Register*].

ADDRESSES: Supplementary information used in the development of this rule, including the public comments received and the environmental assessment may be viewed online at <http://www.regulations.gov> at Docket No. FWS–R9–ES–2011–0072 or at Docket No. NOAA-NMFS-2014-0093.

FOR FURTHER INFORMATION CONTACT: Jennifer Schultz, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301/427–8443; facsimile 301/713–0376; or Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041; telephone 703/358–2171; facsimile 703/358–1735. Persons who use a Telecommunications Device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, and 7 days a week.

SUPPLEMENTARY INFORMATION:

Background

Section 7(a)(2) of the Act requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce, to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species (16 U.S.C. 1536(a)(2)). The Act defines critical habitat as the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Act, on which are found those physical or biological features (1) essential to the conservation of the species and (2) which may require special management considerations or protection, as well as specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species (16 U.S.C. 1532(5)(A)). Conservation means to use and the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary (16 U.S.C. 1532(3)). The Act does not define “destruction or adverse modification.” The Services carry out the Act via regulations in title 50 of the Code of Federal Regulations (CFR).

In 1978, the Services promulgated regulations governing interagency cooperation under section 7(a)(2) of the Act that defined “destruction or adverse modification” in part as a “direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for survival and recovery of a listed species. Such alterations include but are not limited to those diminishing the requirements for survival and recovery. . . .” (43 FR 870, January 4, 1978). In 1986, the Services amended the definition to read “a

direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical” (51 FR 19926, June 3, 1986; codified at 50 CFR 402.02). In 1998, the Services provided a clarification of usage of the term “appreciably diminish the value” in the Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Act (i.e., the Handbook; http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf) as follows: “to considerably reduce the capability of designated or proposed critical habitat to satisfy requirements essential to both the survival and recovery of a listed species.”

In 2001, the Fifth Circuit Court of Appeals reviewed the 1986 definition and found it exceeded the Service’s discretion by requiring an action to appreciably diminish a species’ survival and recovery to trigger a finding of “destruction or adverse modification.” *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001). As stated in the decision (*Sierra Club*, at 441-42 (citations omitted) (emphasis in original)):

The ESA defines ‘critical habitat’ as areas which are ‘essential to the conservation’ of listed species. ‘Conservation’ is a much broader concept than mere survival. The ESA’s definition of ‘conservation’ speaks to the recovery of a threatened or endangered species. Indeed, in a different section of the ESA, the statute distinguishes between ‘conservation’ and ‘survival.’ Requiring consultation only where an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits.

In 2004, the Ninth Circuit Court of Appeals also reviewed the 1986 definition and found portions of the definition to be facially invalid. *Gifford Pinchot Task Force v. U.S.*

Fish and Wildlife Service, 378 F.3d 1059 (9th Cir. 2004). The Ninth Circuit, following similar reasoning set out in the *Sierra Club* decision, determined that Congress viewed conservation and survival as “distinct, though complementary, goals, and the requirement to preserve critical habitat is designed to promote both conservation and survival.”

Gifford Pinchot Task Force, at 1070. Specifically, the court found that “the purpose of establishing ‘critical habitat’ is for the government to designate habitat that is not only necessary for the species’ survival but also essential for the species’ recovery.” *Id.*

“Congress said that ‘destruction or adverse modification’ could occur when sufficient critical habitat is lost so as to threaten a species’ recovery even if there remains sufficient critical habitat for the species’ survival.” *Id.*

After the Ninth Circuit’s decision, the Services each issued guidance to discontinue the use of the 1986 definition (FWS Acting Director Marshall Jones Memo to Regional Directors, “Application of the ‘Destruction or Adverse Modification’ Standard under Section 7(a)(2) of the Act, 2004;” NMFS Assistant Administrator William T. Hogarth Memo to Regional Administrators, “Application of the ‘Destruction or Adverse Modification’ Standard under Section 7(a)(2) of the Act, 2005”). Specifically, in evaluating an action’s effects on critical habitat as part of interagency consultation, the Services began directly applying the definition of “conservation” as set out in the Act. The guidance instructs the Services’ biologists, after examining the baseline and the effects of the action, to determine whether critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species, upon implementation of the Federal action under consultation. “Primary constituent elements” was a term

introduced in the critical habitat designation regulations (50 CFR 424.12) to describe aspects of “physical or biological features,” which are referenced in the statutory definition of “critical habitat”; the Services have proposed to remove the term “primary constituent elements” and return to the statutory term “physical or biological features.” See 79 FR 27066, May 12, 2014.

On May 12, 2014, the Services proposed the following regulatory definition to address the relevant case law and to formalize the Services’ guidance: “*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery.” See 79 FR 27060, May 12, 2014. In the preamble to the proposed rule, we explained that the proposed definition was intended to align with the conservation purposes of the Act. The first sentence captured the role that critical habitat should play for the recovery of listed species. The second sentence acknowledged that some physical or biological features may not be present or may be present in suboptimal quantity or quality at the time of designation.

We solicited comments on the proposed rule for a total of 150 days. We received 176 comments.

Summary of Changes from the Proposed Definition

This final rule aligns the regulatory definition of “destruction or adverse modification” with the conservation purposes of the Act and the Act’s definition of “critical habitat.” It continues to focus on the role that critical habitat plays for the

conservation of listed species and acknowledges that the development of physical and biological features may be necessary to enable the critical habitat to support the species' recovery. Though we made minor changes to clarify our intent, these changes do not alter the overall meaning of the proposed definition. We do not expect this final rule to alter the section 7(a)(2) consultation process from our current practice, and previously completed biological opinions do not need to be reevaluated in light of this rule.

In our final definition, to avoid unnecessary confusion and more closely track the statutory definition of critical habitat, we replaced two “terms of art” introduced in the proposed definition with language that explained the intended meanings. In addition, we modified the second sentence of the definition to avoid unintentionally giving the impression that the proposed definition had a narrower focus than the 1986 definition.

First, as described in detail under the **Summary of Comments** section below, many commenters suggested that we replace two terms, “conservation value” and “life-history needs,” in the proposed definition with simpler language more clearly conveying their intended meanings. After reviewing the comments, we agreed that use of these terms was unnecessary and led to unintended confusion. We modified the proposed definition accordingly. Specifically, we replaced “conservation value of critical habitat for listed species” with “the value of critical habitat for the conservation of a listed species.” We also replaced “physical or biological features that support life-history needs of the species for recovery” in the second sentence with “physical or biological features essential to the conservation of a listed species.” These revisions avoid introducing previously undefined terms without changing the meaning of the proposed definition. Furthermore, these revisions better align with the conservation purposes of the Act, by

using language from the statutory definition of “critical habitat” (i.e., “physical or biological features essential to the conservation of the species”).

Second, commenters also expressed concern that, in their perception, the Services proposed a significant change in practice by appearing to focus the definition on the preclusion or delay of the development of physical or biological features, to the exclusion of the alteration of existing features. We did not intend the proposed definition to signal such a shift in focus. Rather, we believed the first sentence of the proposed definition captured both types of alteration: those of existing features as well as those that would preclude or delay future development of such features. We intended the second sentence of the proposed definition to merely emphasize this latter type of alteration because of its less obvious nature. Because the second sentence of the 1986 definition expressly refers to alterations adversely modifying physical or biological features and to avoid any perceived shift in focus, we revised the proposed definition to explicitly reference alterations affecting the physical or biological features essential to the conservation of a species, as well as those that preclude or significantly delay development of such features.

Final Definition

After considering public comments, Congressional intent, relevant case law, and the Services’ collective experience in applying the “destruction or adverse modification” standard over the last three decades, we finalize the following regulatory definition:

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological

features essential to the conservation of a species or that preclude or significantly delay development of such features.

As described in the preamble to the proposed rule, the “destruction or adverse modification” definition focuses on how Federal actions affect the quantity and quality of the physical or biological features in the designated critical habitat for a listed species and, especially in the case of unoccupied habitat, on any impacts to the critical habitat itself. Specifically, the Services will generally conclude that a Federal action is likely to “destroy or adversely modify” designated critical habitat if the action results in an alteration of the quantity or quality of the essential physical or biological features of designated critical habitat, or that precludes or significantly delays the capacity of that habitat to develop those features over time, and if the effect of the alteration is to appreciably diminish the value of critical habitat for the conservation of the species. If the Services make a destruction or adverse modification determination, they will develop reasonable and prudent alternatives on a case by case basis and based on the best scientific and commercial data available.

As also described in the preamble to the proposed rule, the Services may consider other kinds of impacts to designated critical habitat. For example, some areas that are currently in a degraded condition may have been designated as critical habitat for their potential to develop or improve and eventually provide the needed ecological functions to support species’ recovery. Under these circumstances, the Services generally conclude that an action is likely to “destroy or adversely modify” the designated critical habitat if the action alters it to prevent it from improving over time relative to its pre-action condition. It is important to note that the “destruction or adverse modification” definition

applies to all physical or biological features; as described in the proposed revision to the current definition of “physical or biological features” (50 CFR 424.12), “[f]eatures may include habitat characteristics that support ephemeral or dynamic habitat conditions” (79 FR 27066, May 12, 2014).

Summary of Comments

In our proposed rule (79 FR 27060, May 12, 2014), we requested written comments from the public for 60 days, ending July 11, 2014. We received several requests to extend the public comment period, and we subsequently published a notice (79 FR 36284, June 26, 2014) extending the comment period by an additional 90 days, through October 9, 2014.

During the public comment period, we received approximately 176 comments. We received comments from Tribes, State and local governments, industry, conservation organizations, private citizens, and others.

We considered all substantive information provided during the comment period and, as appropriate, incorporated suggested revisions into this final rule. Here, we summarize the comments, grouped by issue, and provide our responses.

Comment on “conservation” versus “recovery”: A few commenters suggested that conservation is not recovery. One commenter suggested that Congress intended critical habitat to mean areas that are essential to the continued existence of the species, i.e., its survival.

Our Response: We disagree with the commenter that “conservation” means “survival.” Instead, we agree with the courts that Congress intended critical habitat to focus on conservation, which addresses more than mere survival. While we recognize the

distinction between “conservation” and “recovery,” we also acknowledge that the courts and the Services often use the terms synonymously.

The statutory definition of critical habitat includes the phrase “essential to [or for] the conservation of the species” twice; it does not include the word “survival” or the phrase, “the continued existence of the species” (16 U.S.C. 1532(5)(A)). Conservation means to use and the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary (16 U.S.C. 1532(3)). The statutory definition does not include the word “survival” or the phrase, “the continued existence of the species.” This does not appear to be an oversight. Congress used the word “survival” in other places in the Act; they also used the phrase “continued existence of a species” elsewhere and specifically in reference to the jeopardy standard under section 7(a)(2) of the Act.

In 2001, the Fifth Circuit concluded that “‘conservation’ is a much broader concept than mere survival” and “speaks to the recovery” of species: “Indeed, in a different section of the ESA, the statute distinguishes between ‘conservation’ and ‘survival.’” *Sierra Club*, at 441-42. In 2004, the Ninth Circuit added, “Congress said that ‘destruction or adverse modification’ could occur when sufficient critical habitat is lost so as to threaten a species' recovery even if there remains sufficient critical habitat for the species' survival.” Further, the Ninth Circuit indicated that the 1986 definition “fails to provide protection of habitat when necessary only for species' recovery.” *Gifford Pinchot Task Force*, at 1070. Throughout these decisions, the courts used the words “recovery” and “conservation” interchangeably.

The Services view “conservation” as the process used to achieve “recovery,” that is, the improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act (50 CFR 402.02). In the proposed regulatory definition of “conserve, conserving, and conservation,” the Services included the phrase “i.e., the species is recovered” to clarify the link between conservation and recovery of the species. *See* 79 FR 27066, May 12, 2014 (proposing revisions to 50 CFR 424.02). Despite the distinction between the two terms, we often use the terms interchangeably in practice. We believe that this is consistent with Congress’s intent for “conservation” to encompass the procedures necessary to achieve “recovery.”

Comments on “appreciably diminish”: We received 63 comments regarding our use and explanation of the term “appreciably diminish.” Many commenters considered the explanation of the term vague, confusing, and giving too much discretion to the Services. Some suggested that “appreciably diminish” should apply only to the reduction in quality, significance, magnitude, or worth of the physical or biological features that were the basis for determining the habitat to be critical. Others suggested alternatives to “appreciably,” including significantly, measurably, and considerably. Several commenters suggested simply removing the words “both the survival and” from the clarification of usage in the Services’ Handbook. Some commenters believed the Services were “lowering the bar,” while others felt that the Services were “raising the bar” with the definition. Commenters disagreed on whether the Services should consider every perceptible diminishment to critical habitat to be destruction or adverse modification.

Our Response: In the proposed rule, the Services requested comments on whether the phrase “appreciably diminish” is clear and can be applied consistently across

consultations. Though this phrase has been part of the definition of “destruction or adverse modification” since 1978, we invited the public to suggest any alternative phrases that might improve clarity and consistency. Though several commenters responded that phrase is unclear or unable to be consistently applied, they did not present clearer alternatives or examples of inconsistent application.

The courts have not identified problems with the clarity or consistent application of the “appreciably diminish” standard. Though the Fifth (2001) and Ninth Circuits (2004) invalidated the existing regulatory definition because it included the phrase “both the survival and recovery,” they did not comment unfavorably on the word “appreciably” or the term “appreciably diminish.” In 2010, the Ninth Circuit expressly noted that its decision in *Gifford Pinchot* “did not alter the rule that an ‘adverse modification’ occurs only when there is ‘a direct or indirect alteration that *appreciably diminishes* the value of critical habitat.’” *Butte Environmental Council v. U.S. Army Corps of Engineers*, 620 F.3d 936, 948 (9th Cir. 2010) (emphasis in original).

Commenters generally agreed that “diminish” means to reduce; however, several commenters disagreed with our use of the word “appreciably” and suggested we use alternative qualifiers (i.e., significantly, measurably, or considerably). In the preamble of the proposed rule, we discussed the word “appreciably,” as well as the suggested alternatives, which are similar in meaning to the word “appreciably” but also have multiple possible meanings. In light of all the comments received, our review of case law, and our previous experience with the term, we have concluded that no alternative has a sufficiently clear meaning to warrant changing this longstanding term in the regulation.

Without a clearly superior alternative, the Services retain the phrase “appreciably diminish” in the definition of “destruction or adverse modification.”

In the preamble to the proposed rule, we further clarified the meaning of “appreciably diminish” by explaining that the relevant question is whether the reduction has some relevance because we can recognize or grasp its quality, significance, magnitude, or worth in a way that negatively affects the value of the critical habitat as a whole for the conservation of a listed species. Some commenters objected to this clarification and advocated for the retention of the Handbook language, with edits to remove the phrase “both the survival and.”

Courts have looked to the Handbook as guidance for interpreting the “appreciably diminish” standard. In 2008, the U.S. District Court for the Eastern District of California held that the Handbook’s definition of “appreciably diminish” is reasonable and therefore would be applied by the court as guidance. See *Pacific Coast Federation of Fishermen’s Associations v. Gutierrez*, 606 F. Supp. 2d 1195, 1208-09 (E.D. Cal. 2008) (according deference to the agencies’ interpretation under the principles of *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)). The court thus applied “appreciably diminish” as meaning “considerably reduce.” Other district courts have similarly applied the “considerably reduce” language contained in the Handbook’s definition of “appreciably diminish the value.” See *Wild Equity Institute v. City and County of San Francisco*, No. C 11–00958 SI, 2011 WL 5975029, *7 (N.D. Cal. Nov. 29, 2011) (unreported) (noting that, in *Gutierrez*, “The court accepted the FWS’ definition of ‘appreciably diminish’ to mean ‘considerably reduce’”); *Forest Guardians v. Veneman*, 392 F.Supp.2d 1082, 1092 (D.

Ariz. 2005) (applying the handbook’s definition of “appreciably diminish” as guidance for interpreting “reduce appreciably” as used in section 7(a)(2)’s jeopardy standard).

In the preamble to the proposed rule, we acknowledged that the Handbook’s language referring to “both the survival and recovery” as part of its definition of “appreciably diminish the value” is no longer valid. We also indicated that the term “considerably,” taken alone, may lead to disparate outcomes because it can mean “large in amount or extent,” “worthy of consideration,” or “significant.” In light of the comments urging the Services to retain the Handbook clarification, the Services take this opportunity to clarify that the term “considerably,” in this context, means “worthy of consideration” and is another way of stating that we can recognize or grasp the quality, significance, magnitude, or worth of the reduction in the value of critical habitat. We believe that this clarification will allow the Services to reach consistent outcomes, and we reiterate that the Handbook reference to “both the survival and” is no longer in effect.

We disagree with commenters who suggest that every diminishment, however small, should constitute destruction or adverse modification. We find it necessary to qualify the word “diminish” to exclude those adverse effects on critical habitat that are so minor in nature that they do not impact the conservation of a listed species. It is appropriate for the Services to consider the biological significance of a reduction when conducting a section 7(a)(2) consultation. The U.S. District Court for the Eastern District of California rejected as “overly expansive” the plaintiff’s suggestion that “appreciably” means “perceptible”. *Gutierrez*, 606 F.Supp.2d at 1208-09. The guidance issued by the Services in 2004 and 2005 directed the Services to discuss the “significance of anticipated effects to critical habitat,” which the U.S. District Court for the Northern

District of California found appropriate and “sufficient to implement an ‘appreciably diminish’ standard.” *In re Consolidated Salmonid Cases*, 791 F. Supp.2d 802, 872 (E.D. Cal. 2011) (applying NMFS’ 2005 guidance), *affirmed in part, reversed in part on other grounds*, *San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971 (9th Cir. 2014). Similarly, in the context of applying the jeopardy standard from section 7(a)(2) of the Act, which also includes the term “appreciably” (in the phrase “appreciably reduce”), the U.S. District Court for the District of Columbia rejected the argument that the Services are required to recognize every reduction in the likelihood of survival or recovery that is capable of being perceived or measured; the court instead held that the Services have discretion to evaluate a reduction to determine if it is “meaningful from a biological perspective.” *Oceana, Inc. v. Pritzker*, F.Supp.3d, No. 08–1881, 2014 WL 7174875, *8-9 (D.D.C. December 17, 2014).

Thus, our explanation in this final rule of the meaning of “appreciably diminish” is consistent with previous usage; “the bar” for determining whether a proposed action is likely to result in destruction or adverse modification of critical habitat is neither raised nor lowered by this rule. A Federal action may adversely affect critical habitat in an action area without appreciably diminishing the value of the critical habitat for the conservation of the species. In such cases, a conclusion of destruction or adverse modification would not be appropriate. Conversely, we would conclude that a Federal action would result in destruction or adverse modification if it appreciably diminishes the value of critical habitat for the conservation of the species, even if the size of the area affected by the Federal action is small.

In summary, the Services have applied the term “appreciably diminish” from the definition of “destruction or adverse modification” for decades (43 FR 870, January 4, 1978). With the clarifications of usage in this rule, we find no basis in either the comments received or in court decisions to abandon this well-established language.

Comments on “conservation value”: We received 68 comments on the term “conservation value,” suggesting that the term was vague, unnecessary, and confusing.

Our Response: In the proposed rule, the Services requested comments on whether the phrase “conservation value” is clear and can be applied consistently across consultations. We invited the public to suggest alternatives that might improve clarity and consistency in implementing the “destruction or adverse modification” standard.

Upon reviewing the comments, we agreed that inclusion of a new, undefined term, “conservation value,” was unnecessary. We wish to clarify that by introducing the term “conservation value” in the proposed definition, we did not intend to introduce a new concept but rather to reiterate that critical habitat is designated because it has been found to contribute to the conservation of the species, in keeping with the statutory definition of critical habitat. However, to avoid any confusion, we revised the first sentence of the final definition to replace the term “conservation value” with a phrase that conveys its intended meaning, i.e., “the value of critical habitat for the conservation of a listed species.” This minor revision retains the meaning of “conservation value” without introducing a new term. Like the statutory definition of critical habitat, it emphasizes the role of critical habitat in the conservation of a species.

Comments on “survival or recovery”: Several commenters suggested that the Services should simply substitute “or” for “and” in the phrase “survival and recovery” from the 1986 definition.

Our Response: The Services find that simply changing “and” to “or” in the existing regulatory definition would not go far enough to incorporate the refined understanding we now have regarding the role of critical habitat. The Services’ regulations introduced the term “survival” into the 1978 definition; the statutory definition of critical habitat focuses on conservation, which the courts have explained emphasizes recovery. (See *Sierra Club*, at 441: “The ESA's definition of ‘conservation’ speaks to the recovery of a threatened or endangered species.”) The Ninth Circuit further indicates that “Congress said that ‘destruction or adverse modification’ could occur when sufficient critical habitat is lost so as to threaten a species' recovery even if there remains sufficient critical habitat for the species' survival” (*Gifford Pinchot Task Force*, at 1070).

In *Gifford Pinchot*, the Ninth Circuit supported the use of “or” in place of “and”; however, this in no way limits our discretion to revise the definition to more clearly implement Congressional intent. In its definition of critical habitat, Congress uses the word “conservation” and not “survival”; therefore, it is appropriate for the Services to revise the definition to unambiguously emphasize the value of critical habitat for conservation. By doing so, we have produced a regulatory definition that is less confusing, less susceptible to misinterpretation, and more consistent with the intent of Congress than by merely substituting “or” for “and.”

Comments on linking the definition to existing physical and biological features:

We received a few comments requesting that the definition explicitly include alterations of existing physical and biological features.

Our Response: In the proposed definition, we did not intend to disregard the alteration of existing physical or biological features; rather, our goal was to highlight certain types of alterations that may not be as evident as direct alterations, specifically those that preclude or significantly delay development of features. We reiterate and reaffirm that the first sentence of our final definition (*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species.) is meant to encompass all potential types of alterations if they reduce the value of the habitat for conservation, including alterations of existing features.

In response to comments and to avoid further confusion, we revise the second sentence to specifically reference alterations of existing physical and biological features (as does the 1986 definition), in addition to those that preclude or significantly delay development of essential physical or biological features, as examples of effects that may constitute destruction or adverse modification of critical habitat. We believe that the revised sentence provides clarity and transparency to the definition and its implementation while retaining the core idea of the proposed definition.

Comments on “may include, but are not limited to”: We received three comments on the use of the phrase “may include, but are not limited to.” Commenters found this language “overbroad” and thought the definition should be less vague or narrowed or

both. One commenter thought it allowed a “catch-all provision” too favorable to the Federal Government, against prospective good-faith challengers.

Our Response: The phrase, “may include, but are not limited to” emphasizes that the types of direct or indirect alterations that appreciably diminish the value of critical habitat for listed species include not only those that affect physical or biological features, but also those that may affect the value of critical habitat itself. The concept of non-exhaustive inclusion is not new to the regulatory definition of “destruction or adverse modification.” Both 1978 and 1986 definitions included the phrase. This language has not proven problematic in application. Indeed, this phrase is commonly used by the Services to account for the variation that occurs in biological entities and ecological systems, and to preserve the role of the inherent discretion and professional judgment the Services must use to evaluate all relevant factors when making determinations regarding such entities and systems.

We retain the phrase in our final definition, as we believe its meaning is clear and that it serves an important function in the definition. It allows that there may be impacts to an area of critical habitat itself that are not impacts to features. This is particularly important for unoccupied habitat, for which no physical or biological features may have been identified (because physical or biological features are not required to be present in order to designate such an area as critical habitat under the second part of the statutory definition of “critical habitat”). For occupied habitat, the Services must retain the flexibility to address impacts to the area itself, such as those that would impede access to or use of the habitat. As noted in the proposed rule, a destruction or adverse modification

analysis begins with impacts to the features but does not end there (79 FR 27060, May 12, 2014). For these reasons, we retain this phase in the final definition.

Comments on “life-history needs”: We received 12 comments regarding the phrase “physical or biological features that support the life-history needs.” The commenters considered the phrase to be vague and poorly defined. Some commenters felt that the phrase misinterpreted or “lowered the bar” from that intended by the statutory language “physical or biological features essential to the conservation of a species.” Commenters recommended describing the physical and biological features as “essential” or “necessary.”

Our Response: We did not intend the phrase, “physical or biological features that support the life-history needs” to “lower the bar” for identifying physical and biological features, as established in the statutory definition of critical habitat. Rather, our intent was to explain that physical or biological features provide for the life-history needs, which are essential to the conservation of the species.

However, based on review of the public comments on this issue, we recognized the confusion caused by introducing a new “term of art” in the proposed definition. To avoid confusion, we revised the second sentence of the definition to replace the phrase, “support the life-history needs,” with its intended meaning, “essential to the conservation of a species.” In accordance with the statutory definition of critical habitat, the revision emphasizes our focus on those physical or biological features that are essential to the conservation of the species. We believe that the revised sentence, which aligns more closely to the statutory language, provides clarity and transparency to the definition and its implementation.

Comments on “preclude or significantly delay:” We received many comments regarding the terms “preclude or significantly delay” in the proposed definition. Commenters believed these concepts are vague, undefined, and allow for arbitrary determinations. One commenter asserted that focusing on effects that preclude or significantly delay development of features was an expansion of authority that conflicted with E.O. 13604 (Improving Performance of Federal Permitting and Review of Infrastructure Projects).

Our Response: Our proposed definition of “destruction or adverse modification” expressly included effects that preclude or significantly delay the development of physical or biological features that support the life-history needs of the species for recovery. Although we have revised the definition in minor respects from the proposed rule (see **Summary of Changes from the Proposed Definition**, above), we retain its forward-looking aspect.

Our determination of “destruction or adverse modification” is based not only on the current status of the critical habitat but also, in cases where it is degraded or depends on ongoing ecological processes, on the potential for the habitat to provide further support for the conservation of the species. While occupied critical habitat would always contain at least one or more of the physical or biological features essential to the conservation of the listed species, an area of critical habitat may be in a degraded condition or less than optimal successional stage and not contain all physical or biological features at the time it is designated or those features may be present but in a degraded or less than optimal condition. The area may have been designated as critical habitat, however, because of the potential for some of the features not already present or

not yet fully functional to be developed, restored, or improved and contribute to the species' recovery. The condition of the critical habitat would be enhanced as the physical or biological features essential to the conservation of the species are developed, restored, or improved, and the area is able to provide the recovery support for the species on which the designation is based. The value of critical habitat also includes consideration of the likely capability of the critical habitat to support the species' recovery given the backdrop of past and present actions that may impede formation of the optimal successional stage or otherwise degrade the critical habitat. Therefore, a proposed action that alters habitat conditions to preclude or significantly delay the development or restoration of the physical or biological features needed to achieve that capability (relative to that which would occur without the proposed action undergoing consultation), where the change appreciably diminishes the value of critical habitat for the conservation of the species, would likely result in destruction or adverse modification.

This is not a new concept or expansion of authority. The Services have previously recognized and articulated the need for this forward-looking aspect in the analysis of destruction or adverse modification of critical habitat. As discussed in the **Background** section, each Service issued substantially identical guidance following the decisions of the Fifth and Ninth Circuits invalidating the current regulatory definition (FWS 2004; NMFS 2005). For the past 10 years, the Services have evaluated whether, with implementation of the proposed Federal action, critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species. As noted above, "primary constituent elements" was a term introduced in the critical habitat designation

regulations (50 CFR 424.12) to describe aspects of “physical or biological features.” On May 12, 2014, the Services proposed to revise these regulations to remove the use of the term “primary constituent elements” and replace it with the statutory term “physical or biological features” (79 FR 27066). However, the shift in terminology does not change the approach used in conducting a “destruction or adverse modification” analysis, which is the same regardless of whether the original designation identified primary constituent elements, physical or biological features, or both.

Several commenters asserted that assessing the projected condition of the habitat and projected development of physical and biological features would be inconsistent with the Act. The Services disagree. The Act defines critical habitat to include both areas occupied at the time of listing that contain features “essential to the conservation” of the species, as well as unoccupied areas that are “essential for the conservation” of listed species. Unoccupied habitat by definition is not required to contain essential physical or biological features to qualify for designation, and even occupied habitat is not required to contain all features throughout the area designated. Yet, the obligation to preserve the value of critical habitat for the conservation of listed species applies to all designated critical habitat. At some point in the recovery process, habitat must supply features that are essential to the conservation of the species. It is thus important to recognize not only the features that are already present in the habitat, but the potential of the habitat to naturally develop the features over time. Therefore, the Services believe it is necessary (and consistent with the Act) to examine a project’s effects on the natural development of physical and biological features essential to the conservation of a species.

“Preclusion” prevents the features from becoming established. The phrase “significantly delay” requires more explanation. We intend this phrase to encompass a delay that interrupts the likely natural trajectory of the development of physical and biological features in the designated critical habitat to support the species’ recovery. That trajectory is viewed in the context of the current status of the designated critical habitat and with respect to the conservation needs of the listed species.

If the Services make a destruction or adverse modification determination, they will develop reasonable and prudent alternatives on a case by case basis and based on the best scientific and commercial data available.

Comments on “foreseeable future:” We received many comments regarding the term “foreseeable future,” as used in the preamble to the proposed rule. Commenters believed this concept is vague and undefined, and requires speculation on the part of the Services.

Our Response: In the preamble to the proposed rule (79 FR 27060, May 12, 2014), we used the term “foreseeable future” to explain and provide context for the forward-looking aspect of the destruction or adverse modification analysis; we explained that the conservation value of critical habitat also includes consideration of the likely capability, in the foreseeable future, of the critical habitat to support the species’ recovery given the backdrop of past and present actions that may impede formation of the optimal successional stage or otherwise degrade the critical habitat. Therefore, an action that would preclude or significantly delay the development or restoration of the physical or biological features needed to achieve that capability, to an extent that it appreciably diminishes the value of critical habitat for the conservation of the species relative to that

which would occur without the action undergoing consultation, is likely to result in destruction or adverse modification.

In the proposed rule, we used the language “foreseeable future” not as specifically used in the definition of the term “threatened species” but as a generally understood concept; that is, in regards to critical habitat, we consider its future capabilities only so far as we are able to make reliable projections with reasonable confidence. The Services do not speculate when evaluating whether a Federal action would preclude or significantly delay the development of features. As required by the Act, we rely on the best scientific and commercial data available to determine whether the action is likely to destroy or adversely modify critical habitat (16 U.S.C. 1536(a)(2)). This rule formalizes in regulation the forward-looking aspect of the destruction or adverse modification analysis adopted in the 2004 and 2005 guidance.

Additional comments relating to forward-looking aspect of definition: Several commenters felt that considerations regarding “precluding” or “significant delay” and “foreseeable future” would result in more consultations and longer review times.

Our Response: As noted above and in the proposed rule, the Services have applied these concepts since the 2004 and 2005 guidance documents, and no significant increase in the number of consultations or review times has occurred as a result. The Services do not believe that adopting this approach in our regulations will result in more or lengthier consultations.

Comments on defining “destruction or adverse modification” instead of defining “destruction” and “adverse modification” separately: We received three comments requesting that we define “destruction” and “adverse modification” independently.

Our Response: “Destruction or adverse modification of critical habitat” was not defined in the statute. The Services defined the term in the 1978 regulations and amended the definition in 1986. The Services have thus applied the term as a singular concept for many years without difficulty.

Independently defining “destruction” and “adverse modification” is unnecessary and would not alter the outcome of section 7(a)(2) consultations. If, through consultation, the Services determine that a proposed Federal action likely would result in the destruction or adverse modification of critical habitat, we would, if possible, provide a reasonable and prudent alternative to the action. Such alternative must not violate section 7(a)(2) of the Act, must be economically and technologically feasible, must be capable of being implemented in a manner consistent with the intended purpose of the action, and must be capable of being implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction (16 U.S.C. 1536(b)(3)(A); 50 CFR 402.14(h); 50 CFR 402.02 (defining “reasonable and prudent alternatives”)).

Independently defining “destruction” and “adverse modification” would unnecessarily complicate the process without improving it or changing the outcome. The key distinction is whether the action appreciably diminishes the value of critical habitat for the conservation of the species, not whether the action destroys critical habitat or adversely modifies it. The time and effort applied to determine whether the action destroyed or adversely modified critical habitat would be better spent on the identification of reasonable and prudent alternatives to the proposed action. Therefore, we do not independently define “destruction” and “adverse modification.”

Comments on the need for a quantitative definition: Eight commenters suggested the need for a quantitative definition that minimizes the Services' discretion.

Our Response: We did not receive any examples of a quantitative definition. We are not able to provide such a definition because Federal actions, species, and critical habitat designations are complex and differ considerably. Our analyses of the actions and their effects on critical habitat require case-by-case consideration that does not fit neatly into a mathematical formula. Congress anticipated the need for the Services to use their professional judgment by requiring us to provide our opinion, detailing how the action affects species and critical habitat. This opinion must be based on the best available scientific and commercial information available for a particular action and species. The level of specificity and precision in available data will vary across actions and across species, and therefore a one-size-fits-all standard would not be workable.

Further, the U.S. Court of Appeals for the Ninth Circuit has specifically held that nothing in the Act or current regulations requires that the analysis of destruction or adverse modification be quantitative in nature. *Butte Environmental Council*, 620 F.3d at 948 (agency not required to calculate rate of loss of habitat). *See also San Luis & Delta-Mendota Water Authority v. Salazar*, 760 F.Supp.2d 855, 945 (E.D. Cal. 2010) (Services not required to set threshold for determining destruction or adverse modification), *affirmed in part, reversed in part on other grounds sub nom. San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014).

Therefore, we find that attempting to specify a quantitative threshold is neither feasible nor required.

Comments on the scale of analysis: Many commenters expressed confusion or concern regarding the scale at which the determination of destruction or adverse modification of critical habitat is made. Some commenters agreed with the Services' interpretation of the statute and the existing implementing regulations at 50 CFR 402.14, as described in the preamble to the proposed rule, that determinations on destruction or adverse modification are based on critical habitat as a whole, not just on the areas where the action takes place or has direct impacts. These commenters requested clarification of the process used to make such determinations or thought that the language, "critical habitat, as a whole," should be included in the rule and not just the preamble. Other commenters disagreed with the Services' interpretation that the destruction or adverse modification determination should be based on critical habitat as a whole and recommended that the Services evaluate destruction or adverse modification at the smallest scale relevant to determining whether the species has met its recovery criteria.

Our Response: As explained in the preambles to this rule and the proposed rule, the determination of "destruction or adverse modification" will be based on the effect to the value of critical habitat for the conservation of a listed species. In other words, the question is whether the action will appreciably diminish the value of the critical habitat as a whole, not just in the action area (i.e., all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action; 50 CFR 402.02).

The section 7 process involves multiple determinations, made by the action agency or the Services or both, regarding critical habitat. Where critical habitat has already been designated, section 7(a)(2) of the Act applies. Under the implementing

regulations, the Federal agency first determines if its proposed action may affect critical habitat. If such a determination is made, formal consultation is required unless the Federal agency determines, with the written concurrence of the Services, that the action is not likely to adversely affect critical habitat. In accordance with the Act, our implementing regulations at 50 CFR 402.14(g)(1) through (g)(4), and the 2004 and 2005 guidance documents issued by FWS and NMFS (see the **Background** section), the formal consultation process generally involves four components: (1) the status of critical habitat, which evaluates the condition of critical habitat that has been designated for the species in terms of physical or biological features, the factors responsible for that condition, and the intended conservation role of the critical habitat overall; (2) the environmental baseline, which evaluates the current condition of the critical habitat in the action area, the factors responsible for that condition, and the relationship of the affected critical habitat in the action area to the entire critical habitat with respect to the conservation of the listed species; (3) the effects of the action, which includes the direct and indirect effects of the action (and the effects of any interrelated or interdependent activities) and describes how those effects alter the value of critical habitat within the action area; and (4) cumulative effects (as defined at 50 CFR 402.02), which evaluates the effects of future, non-Federal activities in the action area and describes how those effects are expected to alter the value of critical habitat within the action area. After synthesizing and integrating these four components, the Services make their final determination regarding the impact of the action on the overall value of the critical habitat designation. The Services conclude whether critical habitat would remain functional (or retain the current ability for the features to be functionally established in

areas of currently unoccupied but capable habitat) to fulfill its value for the conservation of the species, or whether the action appreciably reduces the value of critical habitat for the conservation of the species.

Where critical habitat has only been proposed for designation, a distinct but related process applies under section 7(a)(4) of the Act. The action agency must initiate a conference with the Services on the effects of its proposed action when the action is likely to result in destruction or adverse modification of the proposed critical habitat (50 CFR 402.10(b)). Although a conference generally will consist of informal discussions leading to advisory recommendations, action agencies have the option of conducting the conference under the same procedures that apply to formal consultations so that a conference opinion is produced (and later adopted as a biological opinion upon finalization of the critical habitat designation, provided certain conditions are met; 50 CFR 402.10(c) and (d)). While there are important differences between the consultation and conference processes, the same analytical steps as described in the paragraph above apply in the Services' evaluation of impacts to critical habitat.

Adverse effects to critical habitat within the action area may not necessarily rise to the level of destruction or adverse modification to the designated critical habitat. The Handbook expressly provides that adverse effects to single elements or segments of critical habitat generally do not result in destruction or adverse modification unless that loss, when added to the environmental baseline, is likely to appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species. Courts have concurred that a proposed action may result in destruction of some areas of critical habitat and still not necessarily result in a finding of "destruction or adverse

modification.” See *Conservation Congress v. U.S. Forest Service*, 720 F.3d 1048, 1057 (9th Cir. 2013) (“Even completely destroying 22 acres of critical habitat does not necessarily appreciably diminish the value of the larger critical habitat area.”); *Butte Environmental Council*, 620 F.3d at 948 (applying the Handbook provision to support the conclusion that “[a]n area of a species’ critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species’ survival or recovery.”).

The analysis thus places an emphasis on the value of the designated critical habitat as a whole for the conservation of a species, in light of the role the action area serves with regard to the function of the overall designation. Just as the determination of jeopardy under section 7(a)(2) of the Act is made at the scale of the entire listed entity, a determination of destruction or adverse modification is made at the scale of the entire critical habitat designation. Even if a particular project would cause adverse effects to a portion of critical habitat, the Services must place those impacts in context of the designation to determine if the overall value of the critical habitat is likely to be reduced. This could occur where, for example, a small affected area of habitat is particularly important in its ability to support the conservation of a species (e.g., a primary breeding site). Thus, the size or proportion of the affected area is not determinative; impacts to a small area may in some cases result in a determination of destruction or adverse modification, while impacts to a large geographic area will not always result in such a finding.

Because the existing consultation process already ensures that destruction or adverse modification of critical habitat is analyzed at the appropriate scale, the Services

decline to include language referring to determinations based on critical habitat “as a whole” in the definition of “destruction or adverse modification.”

Comments on aggregate effects: Several commenters expressed concern that aggregate adverse impacts to critical habitat are not adequately addressed in the Services’ analyses and that the proposed rule should be revised to expressly require the evaluation of aggregate effects to critical habitat that multiple actions will have on a species’ recovery. One commenter urged the Services to develop a system to track the aggregate effects that destroy or degrade critical habitat.

Our Response: The Services’ biological opinion provides an assessment of the status of the critical habitat (including threats and trends), the environmental baseline of the action area (describing all past and present impacts), and cumulative effects. Under the implementing regulations of the Act, cumulative effects are defined as those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation (50 CFR 402.02). Following the definition, we only consider cumulative effects within the action area. The effects of any particular action are evaluated in the context of this assessment, which incorporates the effects of all current and previous actions. This avoids situations where each individual action is viewed as causing only insignificant adverse effects but, over time, the aggregate effects of these actions would erode the conservation value of the critical habitat.

Comments on the role of mitigation in “destruction or adverse modification” findings: Four commenters thought the “net effects” of an action, including consideration of “mitigation and offsetting beneficial” measures, should be considered in the revised

regulatory definition. One commenter suggested that the Services should develop an explicit framework for allowing project proponents to avoid a destruction or adverse modification finding by restoring the same biological or physical feature of critical habitat that they degrade, provided there is evidence the restoration is likely to succeed.

Our Response: As stated in the Services' 2004 and 2005 guidance, conservation activities (e.g., management, mitigation, etc.) outside of designated critical habitat should not be considered when evaluating effects to critical habitat. However, conservation activities within critical habitat, included as part of a proposed action to mitigate the adverse effects of the action on critical habitat, are considered by the Services' in formulating our biological opinion as to whether an action is likely to result in the destruction or adverse modification of critical habitat. This consideration of beneficial actions is consistent with the implementing regulations at 50 CFR 402.14(g)(8), which set forth that in formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation. The Services welcome the inclusion of beneficial conservation activities as part of proposed actions. However, because the question of whether beneficial actions can compensate for impacts to critical habitat is complicated and must be evaluated on a case-by-case basis, it would be advisable for Federal agencies and applicants to coordinate closely with the Services on such activities.

Comments on continuation of current uses: Two commenters discussed current land practices and other uses on areas that may be designated as critical habitat. One

commenter specifically requested that the final rule indicate that continuation of current uses does not constitute destruction or adverse modification.

Our Response: There is nothing in the Act to suggest that previously ongoing activities are or may be exempted from analysis during section 7(a)(2) consultations. Accordingly, our longstanding regulatory framework does not distinguish between ongoing and other actions. “Action” is defined broadly at 50 CFR 402.02 to include all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. The applicability provision of the regulations further explains that section 7(a)(2) obligations arise so long as there is discretionary Federal involvement or control (50 CFR 402.03). It would be unsupported and beyond the scope of the definition of “destruction or adverse modification” to change these well-established principles.

Comments regarding the use of recovery documents as a basis for a destruction or adverse modification determination: We received three comments requesting that the Services clarify that criteria, goals, or programs established in recovery plans are not enforceable and may not be used as a basis for a destruction or adverse modification decision.

Our Response: The Services agree that recovery plans convey guidance and are not regulatory documents that compel any action to occur. In addition, section 7(a)(2) of the Act describes a standard of prohibition rather than a mandate to further recovery. However, criteria, goals, and programs for recovery that are established in these plans may be used in our evaluation of whether, with implementation of the proposed action, critical habitat would retain its value for the conservation of the species. Recovery plans,

in addition to critical habitat rules, may provide the best scientific and commercial information available on the value of critical habitat to the conservation of the species, thus assisting the Services with evaluating the effects of a proposed action on critical habitat.

Comments on undue burden: We received 14 comments regarding the perceived potential for undue burden on Tribes, State and local governments, and various industries. The commenters suggested that the proposed definition would prevent the issuance of permits or impose unwarranted restrictions and requirements on permit applicants, resulting in additional costs for project redesign, reductions in productivity, and increases in the time and effort required to submit permit applications. Some commenters predicted an increase in the number of section 7(a)(2) consultations, especially formal consultations. Others predicted that the Services would conclude destruction or adverse modification of critical habitat more frequently.

Our Response: Because the final regulatory definition largely formalizes existing guidance that FWS and NMFS have implemented since 2004 and 2005, respectively, we conclude that the section 7(a)(2) consultation process will not significantly change. The final definition does not “raise the bar” in any way. We will not reinitiate consultations as a result of this rule. We will consult on ongoing actions in a similar manner as we have since the issuance of the guidance. Therefore, we do not anticipate changes in the costs related to section 7(a)(2) consultations or the frequency at which the Services conclude destruction or adverse modification of critical habitat. The decision to consult is made prior to and independent of our analysis of destruction or adverse modification of critical habitat (i.e., by a Federal agency applying the “may affect” standard of 50 CFR 402.14(a)

to determine whether their action may affect designated critical habitat). If a Federal agency determines, with the written concurrence of the Services, that the proposed action is not likely to adversely affect critical habitat, formal consultation is not required (50 CFR 402.14(b)), and the Services would not perform an analysis of destruction or adverse modification of critical habitat. Therefore, the number of section 7(a)(2) consultations, and formal consultations in particular, is not likely to be affected by this rule.

Comments on Tribe, State, and local coordination: We received five comments from Tribes, State and local governments, and industry groups indicating that we should consult or coordinate with Tribes, States, and local governments to finalize the proposed rule.

Our Response: The Services have undertaken numerous efforts to ensure that our State, Tribal, and other partners had full notice and opportunity to provide input into the development of this rule. We reached out to industry groups, environmental organizations, intergovernmental organizations, and Federal agencies. We worked with the Association of Fish and Wildlife Agencies and the Native American Fish and Wildlife Society to distribute information to Tribes, States, and local governments about the proposed rule. The Services notified their respective Tribal liaisons, who sent letters to Tribes regarding this rule. We also hosted a webinar for the States on May 23, 2014. We considered all submitted comments, which included comments from Tribes, States, and local governments, and, as warranted, applied suggestions to the final rule.

Comments on NEPA: We received 11 comments suggesting that a categorical exclusion from the NEPA was not appropriate for the proposed rule and that the Services should analyze the environmental impacts of this action.

Our Response: The Services believe this rule likely would qualify for one or more categorical exclusions adopted by the Department of the Interior and the National Oceanic and Atmospheric Administration, respectively. Nevertheless, in an abundance of caution, the Services have completed an environmental assessment, which is available at the Federal e-rulemaking portal: <http://www.regulations.gov> (see **ADDRESSES**).

Comments on Energy Supply, Distribution, and Use (E.O. 13211), Takings (E.O. 12630), and Economic Analyses (E.O. 12866, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act): We received comments that the Services should prepare a Statement of Energy Effects (E.O. 13211, 1 comment), a regulatory flexibility analysis (2 comments), and an economic analysis (2 comments).

Our Response: This rule clarifies existing requirements for Federal agencies under the Act. Based on procedures applied through existing agency guidance, the rule is substantially unlikely to lead to different conclusions in section 7(a)(2) consultations. The rule clarifies the standard by which we will evaluate the effect of agency actions on critical habitat pursuant to section 7(a)(2) of the Act. For further information, please see the relevant sections under **Required Determinations**, below.

Comments on extension of the comment period: Many commenters requested an extension of the public comment period announced in the draft policy. Additionally, we received requests to reopen the comment period that ended on October 9, 2014.

Our Response: On June 26, 2014 (79 FR 36284), we extended the public comment period on the draft policy for an additional 90 days to accommodate this request and to allow for additional review and public comment. The comment period for the draft policy was therefore open for 150 days, which provided adequate time for all interested parties to submit comments and information.

Comments on the proposed rule being “beyond the scope of the Act”: We received 25 comments stating that the proposed definition exceeded the authority of the Act. Some commenters wrote that it was beyond the scope of the Act. Some expressed concern that the proposed definition implied an affirmative conservation requirement or mandate for recovery.

Our Response: As the agencies charged with administering the Act, it is within our authority to promulgate and amend regulations to ensure transparent and consistent implementation. Under general principles of administrative law, an agency may resolve ambiguities and define or clarify statutory language as long as the agency’s interpretation is a permissible interpretation of the statute. The term “destruction or adverse modification” was not defined by Congress. Consequently, the Services first promulgated a regulatory definition in 1978, and then later in 1986. As previously mentioned, the "survival and recovery" standard of our earlier definitions was invalidated by courts. We believe that this revised definition comports with the language and purposes of the Act.

As explained in the preamble to the proposed rule, section 7(a)(2) only applies to discretionary agency actions and does not create an affirmative duty for action agencies to recover listed species (79 FR 27060, May 12, 2014). Similarly, the definition of “destruction or adverse modification” is a prohibitory standard only. The definition does

not, and is not intended to, create an affirmative conservation requirement or a mandate for recovery. Consistent with the Ninth Circuit's opinion, in the context of describing an action that "jeopardizes" a species, in *National Wildlife Federation v. NMFS*, 524 F.3d 917 (9th Cir. 2008), the Services believe that an action that "destroys" or "adversely modifies" critical habitat must cause a deterioration in the value of critical habitat, which includes its ability to provide recovery support to the species based on ongoing ecological processes. Section 7(a)(2) of the Act requires Federal agencies to insure that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. Under this section of the Act, Federal agencies are not required to recover species; however, they must insure that their actions are not likely to prevent or impede the recovery of the species through the destruction or adverse modification of critical habitat. To be clear, Federal actions are not required to improve critical habitat, but they must not reduce its existing capacity to conserve the species over time. Section 7(a)(2) and the definition of "destruction or adverse modification" are implemented independent of section 7(a)(1), which directs Federal agencies to utilize their authorities to carry out affirmative conservation programs for listed species.

Comments suggesting revision or withdrawal of the rule: We received 15 comments requesting that we revise or withdraw the proposed rule.

Our Response: In order to administer the Act, the Services need a regulatory definition of "destruction or adverse modification." The Fifth and Ninth Circuits found the current regulatory definition to be invalid over a decade ago because it required that both the survival and the recovery of listed species be impacted. As discussed previously, in 2004 and 2005, the Services issued internal guidance instructing their biologists to

discontinue use of the regulatory definition and to instead consider whether critical habitat would continue to contribute (or have the potential to contribute) to the conservation of the species. After several years of implementation, the Services herein formalize this guidance by modifying the regulatory definition. In response to public comments, we have made minor revisions to the proposed definition; however, the meaning and implementation of the standard remains unchanged. The final definition is clear, implementable, and consistent with the Act.

Required Determinations

Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this final rule is a significant regulatory action and has reviewed this rule under E.O. 12866 because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA requires Federal agencies to provide a statement of the factual basis for

certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certify that this rule will not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This rule clarifies existing requirements for Federal agencies under the Act. Federal agencies are the only entities that are directly affected by this rule, and they are not considered to be small entities under SBREFA's size standards. No other entities are directly affected by this rule.

This rule will be applied in determining whether a Federal agency has ensured, in consultation with the Services, that any action it would authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. Based on procedures applied through existing agency guidance, this rule is unlikely to affect our determinations. The rule provides clarity to the standard with which we will evaluate agency actions pursuant to section 7(a)(2) of the Act.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) This rule will not “significantly or uniquely” affect small governments. We have determined and certify under the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the regulation will not place additional requirements on any city, county, or other local municipalities.

(b) This rule will not produce a Federal mandate of \$100 million or greater in any year (i.e., it is not a “significant regulatory action” under the Unfunded Mandates Reform Act). This regulation would not impose any additional management or protection requirements on the States or other entities.

Takings (E.O. 12630)

In accordance with E.O. 12630, we have determined the rule does not have significant takings implications.

A takings implication assessment is not required because this rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. Indeed, this regulation provides broad program direction for the Services’ application of section 7(a)(2) in consultations on future proposed Federal actions and does not itself result in any particular action concerning a specific property. Further, this rule substantially advances a legitimate government interest (conservation and recovery of listed species) and does not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with E.O. 13132, we have considered whether this rule will have significant Federalism effects and have determined that a federalism summary impact statement is not required. This rule pertains only to determinations of Federal agency compliance with section 7(a)(2) of the Act, and will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This rule will not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This rule clarifies how the Services will make determinations on whether a Federal agency has ensured that any action it authorizes, funds, or carries out is not likely to result in the destruction or adverse modification of critical habitat.

Government-to-Government Relationship with Tribes

In accordance with Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”, November 6, 2000), the Department of the Interior Manual at 512 DM 2, the Department of Commerce (DOC) Tribal Consultation and Coordination Policy (May 21, 2013), DOC Departmental Administrative Order (DAO) 218-8, and NOAA Administrative Order (NAO) 218-8 (April 2012), we have considered possible effects of this final rule on Federally recognized Indian Tribes. Following an exchange of information with tribal representatives, we have determined that this rule, which modifies the general framework for conducting consultations on Federal agency actions under section 7(a)(2) of the Act, does not have tribal implications as defined in Executive Order 13175. We will continue to collaborate and coordinate with Tribes on issues related to Federally listed species and their habitats and work with them as appropriate as we engage in individual section 7(a)(2) consultations. See Joint Secretarial Order 3206 (“American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act”, June 5, 1997).

Paperwork Reduction Act of 1994

This rule does not contain any collections of information that require approval by the OMB under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). This rule does not impose recordkeeping or reporting requirements on Tribes, State or local governments, individuals, businesses, or organizations. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

In the proposed rule, we invited the public to comment on whether and how the regulation may have a significant effect upon the human environment, including any effects identified as extraordinary circumstances at 43 CFR 46.215. After considering the comments received and further evaluating whether there is any arguable basis to require preparation of an environmental assessment, we analyzed this rule in accordance with the criteria of the National Environmental Policy Act, the Department of the Interior regulations on Implementation of the NEPA (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 1-6 and 8), and National Oceanographic and Atmospheric Administration Administrative Order 216-6. This analysis was undertaken in an abundance of caution only, as we believe the rule would qualify for one or more categorical exclusions. Based on a review and evaluation of the information contained in the Environmental Assessment, we made a determination that the Final Definition for the phrase “destruction or adverse modification” of critical habitat will not have a significant effect on the quality of the human environment under the meaning of section 102(2)(c) of the National Environmental Policy Act of 1969 (as amended).

Energy Supply, Distribution or Use (E.O. 13211)

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

References Cited

A complete list of all references cited in this document is available upon request from the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 402

Endangered and threatened species.

Regulation Promulgation

Accordingly, we amend subpart A of part 402, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

PART 402—INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973, AS AMENDED

1. The authority citation for part 402 continues to read as follows:

AUTHORITY: 16 U.S.C. 1531 *et seq.*

2. In § 402.02, revise the definition for “*Destruction or adverse modification*” to read as follows:

§ 402.02 Definitions.

* * * * *

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed

species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

* * * * *

Dated: *January 29, 2014*

Michael J. Bear

Michael J. Bear

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

U.S. Department of the Interior

Dated: January 29, 2016



Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

**~~Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition
of Destruction or Adverse Modification of Critical Habitat~~**

Billing Codes 4310–55–P; 3510–22–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Marine Fisheries Service

50 CFR Part 424

[Docket No. FWS–HQ–ES–2012–0096]

[Docket No. 120106025-5640-03]

[4500030114]

RIN 1018–AX86; RIN 0648–BB79

**Listing Endangered and Threatened Species and Designating Critical Habitat;
Implementing Changes to the Regulations for Designating Critical Habitat**

AGENCIES: U.S. Fish and Wildlife Service, Interior; National Marine Fisheries
Service, Commerce.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the “Services” or “we”), amend portions of our regulations that implement the Endangered Species Act of 1973, as amended (Act). The revised regulations clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for adding species to the Lists of Endangered and Threatened Wildlife and Plants and designating and revising critical habitat. Specifically, the amendments make minor edits to the scope and purpose, add and remove some definitions, and clarify the criteria and procedures for designating critical habitat. These amendments are based on the Services’ review of the regulations and are intended to clarify expectations regarding critical habitat and provide for a more predictable and transparent critical habitat designation process. Finally, the amendments are also part of the Services’ response to Executive Order 13563 (January 18, 2011), which directs agencies to review their existing regulations and, among other things, modify or streamline them in accordance with what has been learned.

DATES: *Effective date:* This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION]. *Applicability date:* This rule applies to rules for which a proposed rule was published after [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION].

ADDRESSES: Public input and a list of references cited for this final rule are available on the Internet at <http://www.regulations.gov>. Supporting documentation used in the preparation of this rule will be available for public inspection, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike; Falls Church, VA 22041–0041, telephone 703/358–2171; facsimile 703/358–1735 and National Marine Fisheries Service, Office of Protected Resources, 1315 East–West Highway, Silver Spring, MD 20910, telephone 301–713–1401; facsimile 301–713–0376.

FOR FURTHER INFORMATION CONTACT: Douglas Krofta, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike, Falls Church, VA, 22041, telephone 703/358–2527; facsimile 703/358–1735; or Marta Nammack, National Marine Fisheries Service, Office of Protected Resources, 1315 East–West Highway, Silver Spring, MD 20910, telephone 301/427–8469; facsimile 301/713–0376. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION: This document is one of three listed below, of which two are final rules and one is a final policy:

- A final rule that amends the regulations governing section 7 consultation under the Endangered Species Act to revise the definition of “destruction or adverse modification” of critical habitat. The previous regulatory definition had been invalidated by several courts for being inconsistent with the language of the Act. That final rule

amends title 50 of the Code of Federal Regulations (CFR) at part 402. The Regulation Identifier Numbers (RINs) are 1018–AX88 and 0648–BB80, and the final rule may be found on <http://www.regulations.gov> at Docket No. FWS–R9–ES–2011–0072.

- A final rule that amends the regulations governing the designation of critical habitat under section 4 of the Act. A number of factors, including litigation and the Services’ experiences over the years in interpreting and applying the statutory definition of “critical habitat,” highlighted the need to clarify or revise the regulations. This final rule (this document) amends 50 CFR part 424. It is published under RINs 1018–AX86 and 0648–BB79 and may be found on <http://www.regulations.gov> at Docket No. FWS–HQ–ES–2012–0096 or at Docket No. NOAA-NMFS-2014-0093.
- A final policy pertaining to exclusions from critical habitat and how we consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. This final policy complements the revised regulations at 50 CFR part 424 and clarifies expectations regarding critical habitat, and provides for a more predictable and transparent exclusion process. The policy is published under RIN 1018–AX87 and 0648–BB82 and may be found on <http://www.regulations.gov> at Docket No. FWS–R9–ES–2011–0104.

Background

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), states that the purposes of the Act are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species,

and to achieve the purposes of certain treaties and conventions. Moreover, the Act states that it is the policy of Congress that the Federal Government will seek to conserve threatened and endangered species, and use its authorities to further the purposes of the Act.

In passing the Act, Congress viewed habitat loss as a significant factor contributing to species endangerment. Habitat destruction and degradation have been a contributing factor causing the decline of a majority of species listed as threatened or endangered species under the Act (Wilcove *et. al.* 1998). The present or threatened destruction, modification, or curtailment of a species' habitat or range is included in the Act as one of the factors on which to base a determination of threatened or endangered species status. One of the tools provided by the Act to conserve species is the designation of critical habitat.

The purpose of critical habitat is to identify the areas that are essential to the species' recovery. Once critical habitat is designated, it can contribute to the conservation of listed species in several ways. Specifying the geographic location of critical habitat facilitates implementation of section 7(a)(1) of the Act by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the Act. Designating critical habitat also helps focus the conservation efforts of other conservation partners, such as State and local governments, nongovernmental organizations, and individuals. Furthermore, when designation of critical habitat occurs near the time of listing, it provides a form of early conservation planning guidance (e.g., identifying some of the areas that are needed for recovery, the physical and biological features needed for the species' life history, and

special management considerations or protections) to bridge the gap until the Services can complete recovery planning.

In addition to serving as an educational tool, the designation of critical habitat also provides a significant regulatory protection—the requirement that Federal agencies ensure, in consultation with the Services under section 7(a)(2) of the Act, that their actions are not likely to destroy or adversely modify critical habitat. The Federal Government, through its role in water management, flood control, regulation of resources extraction and other industries, Federal land management, and the funding, authorization, and implementation of myriad other activities, may propose actions that are likely to affect critical habitat. The designation of critical habitat ensures that the Federal Government considers the effects of its actions on habitat important to species’ conservation and avoids or modifies those actions that are likely to destroy or adversely modify critical habitat. This benefit is especially valuable when, for example, species presence or habitats are ephemeral in nature, species presence is difficult to establish through surveys (e.g., when a plant’s “presence” is sometimes limited to a seed bank), or protection of unoccupied habitat is essential for the conservation of the species.

The Secretaries of the Interior and Commerce (the “Secretaries”) share responsibilities for implementing most of the provisions of the Act. Generally, marine and anadromous species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of FWS and by the Secretary of Commerce to the Assistant Administrator for Fisheries.

There have been no comprehensive amendments to the Act since 1988, and no comprehensive revisions to part 424 of the implementing regulations since 1984. In the years since those changes took place, the Services have gained considerable experience in implementing the critical habitat requirements of the Act, and there have been numerous court decisions regarding the designation of critical habitat.

On May 1, 2012, the Services finalized the revised implementing regulations related to publishing textual descriptions of proposed and final critical habitat boundaries in the **Federal Register** for codification in the Code of Federal Regulations (77 FR 25611). That final rule revised 50 CFR 424.12(c) to make the process of designating critical habitat more user-friendly for affected parties, the public as a whole, and the Services, as well as more efficient and cost effective. Since the final rule became effective on May 31, 2012, the Services have continued the publication of maps of proposed and final critical habitat designations in the **Federal Register**, but the inclusion of any textual description of the designation boundaries in the **Federal Register** for codification in the Code of Federal Regulations is optional. Because we revised 50 CFR 424.12(c) separately, we do not discuss that paragraph further in this final rule.

On August 28, 2013, the Services finalized revisions to the regulations for impact analyses of critical habitat (78 FR 53058). These changes were made as a result of the President's February 28, 2012, Memorandum, which directed us to take prompt steps to revise our regulations to provide that the economic analysis be completed and made available for public comment at the time of publication of a proposed rule to designate critical habitat. These revisions also state that the impact analysis should focus on the

incremental effects resulting from the designation of critical habitat. Because we have revised 50 CFR 424.19 separately, we do not discuss that section further in this final rule.

Summary of Comments and Recommendations

In the proposed rule published on May 12, 2014 (79 FR 27066), we requested that all interested parties submit written comments on the proposal by July 11, 2014. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties, and invited them to comment on the proposal. We did not receive any requests for a public hearing. We did receive several requests for an extension of the public comment period, and on June 26, 2014 (79 FR 36284), we extended the public comment period to October 9, 2014. All substantive information provided during the comment periods has either been incorporated directly into this final determination or addressed in the more specific response to comments below.

General Issues

(1) Comment: Several commenters, including several States, provided edits to the proposed regulation.

Our Response: We have reviewed the edits provided and, where appropriate, we have incorporated them into this final regulation. The more specific comments and edits are addressed below.

(2) Comment: Several comments stated that the proposed changes to the regulation would vastly expand the area of critical habitat designation, in direct conflict with using the critical habitat designation as a conservation tool.

Our Response: The proposed changes to the regulation are not likely to vastly expand the areas included in any particular critical habitat designation. Many commenters focused on the inclusion of unoccupied areas or perception that the proposed changes expand the Services' authority to include such areas in a critical habitat designation. Section 3(5)(A) of the Act expressly allows for the consideration and inclusion of unoccupied habitat in a critical habitat designation if such habitat is determined to be essential for the conservation of the species. However, the existing implementing regulations state that such unoccupied habitat can be considered only if a determination is made that the Service(s) cannot recover the species with the inclusion of only the "geographical area presently occupied" by the species, which is generally understood to refer to habitat occupied at the time of listing (50 CFR 424.12(e)). As discussed in the proposed rule, we have determined that the provision is an unnecessary and redundant limitation on the use of an important conservation tool. Further, we have learned from years of implementing the critical habitat provisions of the Act that a rigid step-wise approach, i.e., first designating all occupied areas that meet the definition of "critical habitat" (assuming that no unoccupied habitat is designated) and then, only if that is not enough, designating essential unoccupied habitat may not be the best conservation strategy for the species and in some circumstances may result in a designation that is geographically larger, but less effective as a conservation tool. Our proposed change will allow us to consider the inclusion of occupied and unoccupied areas in a critical habitat designation following any general conservation strategy that has been developed for the species. In some cases (e.g., wide ranging species like the spotted owl or lynx), we have found and expect that we will continue to find that the inclusion of

all occupied habitat in a designation does not support the best conservation strategy for a species. We expect that the concurrent evaluation of occupied and unoccupied areas for a critical habitat designation will allow us to develop more precise and deliberate designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing unnecessary regulatory burdens.

(3) Comment: Several commenters including one State noted that recovery planning and critical habitat designation are two different processes. A commenter also asked how the Services will “infer” that unoccupied areas will eventually become necessary for recovery given that recovery plans do not exist at the time of listing and when it is not appropriate to designate unoccupied areas that are essential for recovery.

Our Response: While we agree that the designation of critical habitat and the recovery planning processes are different and guided by two separate provisions of the Act and implementing regulations, the ultimate goal of developing effective conservation tools and measures to recover a listed species is the same. A general draft conservation strategy or criterion that informs the construction of a critical habitat designation is often developed in consultation with staff working in recovery planning and implementation to ensure collaboration, consistency, and efficiency as the Services work with the public and partners to recover a listed species.

We have replaced the word “infer” with the word “determine” in our preambular discussion to be clearer. We will determine from the record and based on any existing conservation strategy for the species if any unoccupied areas are likely to become

necessary to support the species' recovery. In order to designate unoccupied areas, we are required by section 3(5)(A) of the Act to determine that such areas are essential for the conservation of the species.

(4) Comment: Several commenters stated that this attempt by the Services to expand their own discretion and authority without congressional authorization is neither justified nor lawful.

Our Response: The amended regulations do not expand the Services' discretion. Rather, they clarify the existing process by which we designate critical habitat based on lessons learned over many years of implementing critical habitat and relevant case law. The amendments synchronize the language in the implementing regulations with that in the Act to minimize confusion, and clarify the discretion and authority that Congress provided to the Secretaries under the Act. The Services are exercising their discretion to resolve ambiguities and fill gaps in the statutory language, and the amended regulations are a permissible interpretation of the statute.

(5) Comment: Several commenters were concerned that the changes would lead to extensive litigation because the Services failed to establish clear, measurable, and enforceable criteria for what should or should not be considered "habitat" for a given species, let alone whether an area should or should not be considered critical habitat under the Act.

Our Response: The amended regulations do not substantially change the manner in which critical habitat is designated. Rather, the amendments primarily clarify how the

Services already have been developing critical habitat designations. We have set forth criteria in the final rule below. We will also refine, to the extent practicable, and articulate the specific criteria used for identifying which features and areas are essential to the conservation of a species and the subsequent development of a critical habitat designation for each species (using the best scientific data available) in the proposed and final critical habitat rules. Our intent is to be more transparent about how we define the criteria and any generalized conservation strategy that may have been used in the development of a critical habitat designation to provide for a more predictable and transparent critical habitat designation process.

(6) Comment: Several commenters stated that the Services have misled stakeholders and effectively failed to provide adequate notice and opportunity for public comment. The comments assert that we should withdraw our proposal, republish it with a more accurate and clear summary of the changes to the regulations and their implications, and provide further opportunity for public comment.

Our Response: The Services have not misled stakeholders. We initially provided a 60-day public comment period on the proposed rule. In response to public comments requesting an extension, we extended the comment period for an additional 90 days. This followed extensive coordination and discussion with potentially affected Federal agencies, States, and stakeholders and partners, as well as formal interagency review under Executive Order 12866. We also held subsequent calls and extensive webinars with many stakeholders to further inform them about the proposed rule and address any questions or concerns they may have had at the time. This satisfies the Services

obligation to provide notice and comment under the Act and the Administrative Procedure Act (APA).

(7) Comment: Several tribes commented that traditional ecological knowledge should constitute the best scientific data available and be used by the Services.

Our Response: Traditional ecological knowledge (TEK) is important and useful information that can inform us as to the status of a species, historical and current trends, and threats that may be acting on it or its habitat. The Services have often used TEK to inform decisions under the Act regarding listings, critical habitat, and recovery. The Act requires that we use the best scientific and commercial data available to inform decisions to list a species and the best scientific data available to inform designation of critical habitat, and in some cases TEK may be the best data available. The Services cannot determine, as a general rule, that TEK will be the best available data in every rulemaking. However, we will consider TEK along with other available data, weighing all data appropriately in the decision process. We will explain the sources of data, the weight given to various types of data, and how data are used to inform our decision. Further, any data, including TEK, used by the Services to support a listing determination or in the development of a critical habitat designation may be subject to disclosure under the Freedom of Information Act (FOIA).

(8) Comment: One State strongly advised the Services to withdraw the **Federal Register** notice and form a Policy Advisory group on the issue. The Western Governors'

Association requested that the rule be reworked in cooperation with Western States and utilize State data to reach a more legally defensible result and to foster partnerships.

Our Response: We appreciate the interest by the State and Western Governors' Association to form a policy advisory group and work collaboratively with the Services. However, the Services have already coordinated with States, Federal agencies, and partners to develop the amended regulations, and do not agree that a Policy Advisory group is necessary. The Services have relied on input from States and other entities, as well as lessons we have learned from implementing the provisions for critical habitat under the Act, to make the regulations consistent with the statute, codify our existing practices, and provide greater clarity and flexibility to designate critical habitat so that it can be a more effective conservation tool. We will continue working collaboratively with Federal, State, and private partners to ensure that our critical habitat designations are based on the best available scientific information and balance the conservation needs of the species with the considerations permitted under section 4(b)(2).

Scope and Purpose (Section 424.01)

(9) *Comment:* Several commenters including several States suggested that we retain the words “where appropriate” to qualify the reference to designation or revision of critical habitat as it is a phrase of limiting potential. Some commenters suggested that we replace the words with “unless deemed imprudent” to better clarify the intention of this proposed change.

Our Response: As discussed in our proposal, the phrase “where appropriate” was misleading and implied a greater flexibility than the Services have regarding whether to designate critical habitat. The Services have the discretion not to designate critical habitat only for species listed prior to 1978 for which critical habitat has not previously been designated or where an explicit determination is made that designation is not prudent. Based on our experiences with designating critical habitat, a determination that critical habitat is not prudent is rare. Removing the phrase “where appropriate” still allows the Services to determine that critical habitat is not prudent for a species if such determination is supported by the best available scientific information. Replacing it with the phrase “unless deemed imprudent” implies that not prudent determinations are common, which is not our intent. Deleting “where appropriate” provides the necessary clarification concerning the discretion the Services have in determining when to designate critical habitat.

(10) *Comment:* Several commenters suggested that we add the words “at the appropriate time” in place of the words “where appropriate” to qualify the reference to designation or revision of critical habitat in § 424.01(a).

Our Response: The Services are required under section 4(a)(3)(A) of the Act to designate critical habitat, to the maximum extent prudent and determinable, at the time a species is listed. The inclusion of the phrase “at the appropriate time” and the implication that the Services have flexibility regarding the timing of the designation process runs counter to the statutory text.

Definitions

(11) Comment: Several commenters including one State asked us to keep the definitions for “critical habitat,” “endangered species,” “plant,” “Secretary,” “State Agency,” and “threatened species” in the regulation for the purpose of transparency and clarity because they are core definitions in the authorizing statute and are important terms in the regulations.

Our Response: These terms are defined in the Act itself, thus repeating them verbatim in the implementing regulations is redundant and does not resolve any ambiguity.

(12) Comment: Several commenters were concerned that the addition of the phrase “i.e., the species is recovered” to the definition of “conserve, conserving, and conservation” to explain the point at which the measures provided under the Act are no longer necessary resulted in a higher standard for conservation than is warranted. Others commented that the Services are implying that conservation of critical habitat is equated to meeting recovery goals.

Our Response: The use of “recovered” in the definition of “conserve, conserving, and conservation” does not introduce a new standard for conservation. Rather, it clarifies the existing link between conservation and recovery. Conservation is the use of all methods and procedures that are necessary to bring any species to the point at which measures provided by the Act are no longer necessary. Recovery is improvement in the

status of listed species to the point at which listing is no longer appropriate. Also see our response to comment 2.

(13) Comment: One commenter stated that if the “i.e., the species is recovered” is added to the definition of “conserve, conserving, and conservation,” then the Services should also add the phrase “or extinct” since these examples describe when the action of conservation (a set of methods and procedures) are not necessary anymore.

Our Response: “Conserve, conserving, and conservation” is defined in the Act as to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Extinction does not meet this definition because extinct species have not been brought to the point at which listing is no longer necessary. Our regulations at § 424.11(d) state that a species may be delisted for one or more of the following reasons: (1) Extinction; (2) Recovery; (3) Original data for classification in error. Each of these is a separate category, and only recovered species have reached the recovered state contemplated by the definition of “conserve, conserving, and conservation.” (See our response to comment 12).

(14) Comment: Several commenters stated that proposing to define “geographical area occupied by the species” is an amendment to the definition in the Act and is illegal.

Our Response: The Act does not define the phrase “geographical area occupied by the species.” The Services may develop, clarify, and revise regulations implementing the provisions of a statute, provided that our interpretations do not conflict with or exceed

the authority provided by the statute. Since there has been considerable confusion as to the specific area and scale the phrase refers to, we find that it is important to provide a reasonable and practicable definition for this phrase based on what we have learned over the many years of implementing critical habitat under the Act. Providing this definition will clarify how we designate critical habitat and which areas are considered occupied at the time of listing.

(15) Comment: Several States commented that the definition of “geographical area occupied by the species” provides no objective criteria, which will only lead to further confusion and more litigation. One State requested that we abandon the definition. Several States offered revised language.

Our Response: The Services are defining the term “geographical area occupied by the species” because the phrase is found in the Act but is not defined in the Act’s regulations, and because there has been considerable confusion over the proper interpretation of the phrase. We have clearly stated and explained the definition in our proposal. Further, we will specify the criteria used for identifying which features and areas are essential to the conservation of a species and the subsequent development of a critical habitat designation for each species (using the best scientific data available) in the proposed and final rules for a particular critical habitat designation. Our intent is to be more clear and transparent about how we define the criteria and any generalized conservation strategy that may have been used in the development of a critical habitat designation to enhance its use as a conservation tool.

(16) *Comment:* One State commented that “regular or consistent use” is a hallmark of a finding of occupied habitat, and should be required by the “geographical area occupied by the species” definition, not excluded. The State pointed to the decision in *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), in which the court upheld the application of the Service’s definition of occupied habitat for the Mexican spotted owl as “areas that the owl uses with sufficient regularity that it is likely to be present during any reasonable span of time.” Another State similarly commented that the use of the term “even if not used on a regular basis” in the definition of geographical area occupied by the species will now enable the Services to designate critical habitat within areas infrequently used by a species.

Our Response: We respectfully disagree with the commenter that the definition of “geographical area occupied by the species” should be limited to only those areas in which the use by the species is “regular or consistent.” As discussed at length in our proposal, we find that the phrase “geographical area occupied by the species” should also include areas that the species uses on an infrequent basis such as ephemeral or migratory habitat or habitat for a specific life-history phase. We find that this more inclusive interpretation is consistent with legislative history and *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), and congressional intent. Additionally, based on our experience of implementing the provisions of critical habitat for many years, we have found that there has been considerable confusion and differing interpretations of this phrase. Our intent through the definition provided in our proposal was to provide greater clarity regarding how we interpret the phrase and the general scale at which we define occupancy. We give examples in the rule of areas such as migratory corridors, seasonal

habitats, and habitats used periodically (but not solely by vagrant individuals). We will use the best scientific data available to determine if such areas occur for a species. Each species' life cycle is different and the details of such areas, if they exist, would be explained in the proposed and final rules designating critical habitat for a particular species. These areas would also have to meet the criteria for occupied areas in the definition of critical habitat found in the Act.

(17) Comment: One commenter stated that the definition of “geographical area occupied by the species” fails to include paragraph 3(5)(C) from the Act: “Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.”

Our Response: The regulatory definition is intended to clarify how we interpret the phrase, not to repeat the language of the statute. Further, paragraph 3(5)(C) in the Act, applies to the geographic area that *can* be occupied by a species, as opposed to the geographic area actually occupied by the species.

(18) Comment: Several commenters including several States stated that the definition of “geographical area occupied by the species” provides unlimited discretion and authority to the Secretary to determine the boundaries and size of the critical habitat area.

Our Response: While we agree that the Secretaries are afforded significant discretion and authority to define and designate critical habitat, we respectfully disagree with the commenter that the discretion and authority is unlimited. First, critical habitat is

to be defined and designated based on the best scientific data available. Second, we have learned from years of implementing the critical habitat provisions of the Act that often a rigid step-wise approach, i.e., first designating all occupied areas that meet the definition of “critical habitat” (assuming that no unoccupied habitat is designated) and then, only if that is not enough, designating essential unoccupied habitat, may not be the best conservation strategy for the species and in some circumstances may result in a designation that is geographically larger, but less effective as a conservation tool. By providing a definition of “geographical areas occupied by the species” along with the other revisions and clarifications in our proposal, we can be more precise and deliberate in the development of our critical habitat designations following any general conservation strategy that has been developed for the species. Lastly, we are still bound by paragraph 3(5)(C) (see response to Comment 17 above).

(19) Comment: Several commenters asked, “What standards will be in place to substantiate that such areas are used as part of a species’ life cycle and not just an individual vagrant’s life cycle” in the definition of “geographical area occupied by the species.” Several States also commented that the vagrant animal exception in the rule is vague and subject to varying interpretations because no definition of “vagrant” is provided.

Our Response: As stated in our proposed rule, vagrant individuals are species who wander far from the known range of the species. We will use the best scientific data available to determine whether an area is used by a species for part of its life cycle versus an individual vagrant’s life cycle. The basis for our determination on this point

will be articulated in our proposed and final rules designating critical habitat for a particular species and subject to public review and comments, as well as peer review.

(20) *Comment:* Several commenters suggested that we add the word “regularly” to the sentence “Such areas may include those areas used **regularly** throughout all or part of the species’ life cycle” in the definition of “geographical area occupied by the species.”

Our Response: The suggested addition would conflict with the second part of the sentence, in which we state “even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).” If the best scientific data available indicates that these areas are used periodically during some portion of the listed species’ life history, then these areas should be considered in the development of a critical habitat designation.

(21) *Comment:* Several commenters questioned what would happen to the size, shape, and location of critical habitat areas that were designated in areas that were not regularly used as conditions change and travel corridors shift or breeding areas move.

Our Response: As discussed in our proposal and throughout this final rule, critical habitat is to be based on the best scientific data available, and to the maximum extent prudent and determinable promulgated concurrent with the listing of a species. Often at the time of listing when we are developing a designation of critical habitat for a species, we may have only limited data concerning the distribution of the species, its life-history requirements, and other factors that can inform the identification of features or

specific areas essential to the conservation of the species. Such limited data may still be the best scientific data available. The Services are required in a proposed and final designation of critical habitat to clearly articulate what data are being used and the criteria for defining the specific essential features and areas. The Services must also allow for public review and comments on the proposal to ensure public involvement in the process and provide as much clarity and transparency as possible. The designation of critical habitat results in a regulation in which the boundaries of critical habitat for a species are defined. These boundaries can be changed only through rulemaking. Thus, if habitat changes following a designation, such that those specific areas no longer meet the definition of “critical habitat,” the areas within the boundaries of critical habitat are still critical habitat until such time as a revision to the designation is promulgated. Any interested party may file a petition with the Services to request revision of a critical habitat designation.

(22) Comment: A number of commenters, including several States, asserted that the proposed definition of “geographical area occupied by the species” is so vague it could lead to huge areas of unoccupied and potentially unsuitable habitat being designated as critical habitat that would result in the public or the regulated community having no consistency.

Our Response: The proposed definition would not lead to more expansive critical habitat designations. We do not designate areas that are occupied at the time of listing unless those areas have one or more of the physical or biological features present that are essential to the conservation of the species and may require special management

considerations or protection. Any unoccupied habitat at the time of listing could only be designated critical habitat under section 3(5)(A)(ii) of the Act, which requires a determination by the Secretary that such areas are essential for the conservation of the species. Further, we will articulate the specific criteria used for identifying which features and areas are essential to the conservation of a species during the subsequent development of a critical habitat designation for each species (using the best scientific data available) in the proposed and final rules designating critical habitat for that species. Our intent is to be more clear and transparent about how we define the criteria for designation and how in the development of a critical habitat designation we use any generalized conservation strategy that may have been developed for the species. The proposed rule would inform the public, including landowners and businesses, of our critical habitat designation and allow them time to review and provide comments.

(23) *Comment:* Two States commented that the Services have justified the new definition of “geographical area occupied by the species” by misrepresenting the court’s decision in *Otay Mesa Property L.P. v. DOI*, 646 F.3d 914 (D.C. Cir. 2011), *reversing* 714 F. Supp. 2d 73 (D.D.C. 2010). The States contend that we asserted that the D.C. Circuit’s decision supported our interpretation, even though a thorough review of the decision reveals the court did not hold or find that the Act allows the Services to make a post-listing determination of occupancy if based on adequate data, simply because the court did not decide that particular issue.

Our Response: We agree that the D.C. Circuit did not hold or find that the ESA allows the Services to make a post-listing determination of occupancy. Our proposed

rule, however, did not assert that the *circuit court* opinion supported our interpretation. Instead, the proposed rule correctly noted that the *district court* opinion supported our interpretation. *See* 714 F. Supp. 2d at 83 (“The question, therefore, is not whether FWS knew in 1997, when it listed the San Diego fairy shrimp as endangered, that there were San Diego fairy shrimp on Plaintiffs’ property but, rather, whether FWS reasonably concluded, based on data from 2001, that the shrimp had been on the property in 1997.”). Because that decision was reversed by the D.C. Circuit, however, we needed to explain what effect that D.C. Circuit’s decision had on the district court opinion with respect to this issue. Because the D.C. Circuit reversed the district court’s opinion on other grounds (i.e., that the evidence in the record was inadequate), the D.C. Circuit did not address the interpretive issue of whether later data can support a determination of occupancy at the time of listing. Thus, we stated, accurately, that the D.C. Circuit “did not disagree” with this aspect of the district court’s opinion. We did not mean to suggest that the D.C. Circuit had considered and affirmed this aspect of the district court’s opinion.

(24) *Comment:* One State commented that the Service’s reliance on the decision in *Arizona Cattle Growers’ Assoc. v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), to expand the definition of “occupied” is misplaced because the Services oversimplify and misstate the court’s ruling. The State provided additional detail regarding the court’s analysis, noting a variety of factors that the court suggested were relevant to a case-by-case determination of occupancy, and the court’s emphasis on reasonableness.

Our Response: None of the detail provided by the State is inconsistent with our summary of the holding: “a determination that a species was likely to be temporarily

present in the areas designated as critical habitat was a sufficient basis for determining those areas to be occupied, even if the species was not continuously present.”

(25) Comment: One commenter asserted that the “physical or biological features” definition has too many if and if/then scenarios that appear too scientifically attenuated to serve as an appropriate basis for critical habitat designations.

Our Response: In defining physical and biological features, we provided examples of types of features and conditions that we have found to be essential to certain species based on experience over many years of designating critical habitat for a wide variety of species. The determination of specific features essential to the conservation of a particular species will be based on the best scientific data available and explained in the proposal to designate critical habitat for that species, which will be available for public comment and peer review.

(26) Comment: Several States commented that the new definition of “physical or biological features” is excessively broad and completely unnecessary. They stated that the new definition goes too far and allows the Services to include areas that do not currently have any essential physical or biological features necessary for a species; they asserted that the original language of the Act provides enough latitude to allow for ephemeral, essential habitat requirements. Two States also asked the Services to more clearly define the phrase “reasonable expectation” found in the preamble discussion (“the Services could conclude that essential physical or biological features exist in a specific

area . . . if there were documented occurrences of the particular habitat type in the area and a reasonable expectation of that habitat occurring again”).

Our Response: Because the term “physical or biological features” is not defined in the Act, the Services clarify how they have been using this term. A “reasonable expectation” would be based on the best scientific data available showing that the habitat has a temporal or cyclical nature in that in some years particular habitat elements may not be present, but the record indicates that, once certain conditions are met, the habitat will recur and be used by the species.

(27) *Comment:* One State contended that the Services support the new definition of “physical or biological features” with a flawed interpretation of the opinion in *Cape Hatteras Access Preservation Alliance v. DOI*, 344 F. Supp. 2d 108 (D.D.C. 2004). According to the State: that opinion does not justify expanding the meaning and breadth of the phrase; the Services should withdraw the definition because the Services cite no authority for making such a change and thus lack any justification for doing so; the Court explicitly rejected the Service’s attempt to broaden the scope of critical habitat designation; and the Services should not attempt to expand their authority by circumventing the Federal courts.

Our Response: The district court rejected the U.S. Fish and Wildlife Service’s critical habitat designation for the piping plover as including lands that did not currently contain the features defined in the rule, but noted that it was not addressing whether dynamic land capable of supporting plover habitat can itself be one of the physical or biological features essential to the conservation of the plover. The court noted that the

Service had not made that assertion in the context of the piping plover designation. To address this unintentional gap, we are setting out our interpretation as part of the framework regulations. This new definition clarifies that features can be dynamic or ephemeral habitat characteristics. We clearly state in the rule that an area within the geographical area occupied by the species, with habitat that is not ephemeral by nature but that has been degraded in some way, must have one or more of the features at the time of designation to be critical habitat.

(28) Comment: Several commenters recommended that the Services separately define “physical features” and “biological features” to provide greater clarity.

Our Response: The Act refers to “physical or biological features,” so it is not necessary to define them separately. We find that the definition provided in the draft proposal along with the examples and accompanying explanation provides sufficient clarity and that separately defining these terms in the final regulation would not be helpful. However, the Services must clearly articulate, in proposed and final rules designating critical habitat for a particular species, which physical or biological features are essential to the conservation of the species and the basis for that critical habitat.

(29) Comment: Several commenters suggested that we remove “at a scale determined by the Secretary to be appropriate” and add “for a specific unoccupied area to be designated as critical habitat, it must be reasonably foreseeable that (1) such area will develop the physical and biological features necessary for the species and (2) such

features will be developed in an amount and quality that the specific area will serve an essential role in the conservation of the species.”

Our Response: We determine whether unoccupied areas are essential for the conservation of the species by considering the best available scientific data regarding the life-history, status, and conservation needs of the species, which include considerations similar to those raised by the commenter. However, we do not agree that the specific findings suggested by the commenter either are required under the statute or are useful limitations for the Services to impose on themselves. Further, our rationale for why unoccupied areas are essential for the conservation of the species will be articulated in the proposed rule designating critical habitat for a particular species and available for public review and comment. Finally, we decline to remove the language “at a scale determined by the Secretary to be appropriate because we have concluded that it is useful to clarify that different circumstances will require different scales of analysis, and the Secretary retains the discretion to choose an appropriate scale.

(30) Comment: A commenter suggested that we add the phrase “based on the best scientific data available” after the word “appropriate” in “the Secretary will identify, at a scale determined by the Secretary to be appropriate” in § 424.12(b)(2). The commenter further stated that this provides a reference to the scientific basis on which the Secretary will determine this scale.

Our Response: The phrase “based on the best scientific data available” is captured in § 424.12(b)(1)(ii). Under section 4(b)(2) of the statute, it also states that the Secretary shall designate critical habitat, and make revisions thereto, under subsection

(a)(3) on the basis of the best scientific data available. It would be redundant to add the phrase to the section the commenter has suggested. Nevertheless, as stated above, the Secretary's choice of scale will be based on the best available scientific data.

(31) Comment: A commenter suggested that we replace the phrase “conservation needs of the species” with “physical or biological features” in § 424.12(b)(2). The commenter stated that the phrase “conservation needs of the species” is undefined and adds ambiguity to the regulation.

Our Response: Section 424.12(b)(2) refers to the designation of critical habitat in unoccupied areas. Under section 3(5)(A)(ii) of the statute, unoccupied areas are subject only to the requirement that the Secretary determine that such areas are essential for the conservation of the species. The presence of physical or biological features is not required by the statute for the inclusion of unoccupied areas in a designation of critical habitat. Incorporating the edit suggested by the commenter would limit Secretarial discretion in a way inconsistent with the statute by mandating the presence of essential features as a prerequisite to inclusion of unoccupied areas in a critical habitat designation. Therefore, it would be inappropriate to use the term “physical or biological features” in this section.

(32) Comment: Several commenters stated that the Services' claim that they may designate acres or even square miles without evidence that those areas contain features essential to the conservation of the species is contrary to the Act. Two States commented that the scale of critical habitat should not be left to the Secretary's absolute discretion

and must be chosen and justified at a scale that both makes sense in terms of the habitat needs of the species and is fine enough to demonstrate that the physical or biological features are found in each specific area of occupied habitat. One State also provided revised language for § 424.12(b)(1) by replacing “at a scale determined by the Secretary to be appropriate” with “at a scale consistent with the geographical extent of the physical or biological features essential to the species’ conservation.”

Our Response: We state in the proposed regulation that the Secretary need not determine that each square inch, yard, acre, or even mile independently meets the definition of critical habitat. However, setting out defined guidelines for the scale of an analysis in regulations would not be practicable for the consideration of highly diverse biological systems and greatly differing available data. Each critical habitat designation is different in terms of area proposed, the conservation needs of the species, the scope of the applicable Federal actions, economic activity, and the scales for which data are available. Additionally, the scale of the analysis is very fact specific. Therefore, the Services must have flexibility to evaluate these different areas in whatever way is most biologically and scientifically meaningful. For example, for a narrow-endemic species, a critical habitat proposal may cover a small area; in contrast, for a wide-ranging species, a critical habitat proposal may cover an area that is orders of magnitude greater. The appropriate scale for these two species may not be the same. For the narrow-endemic species, we may look at a very fine scale with a great level of detail. In contrast, for the wide-ranging species, which may cover wide expanses of land or water, we may use a coarser scale, due to the sheer size of the proposed designation. Each critical habitat proposal includes a description of the scope of the area being proposed, and uses a scale

appropriate to that situation based on the best scientific data available. The suggested language would not allow for the Secretarial discretion that is needed to be flexible to meet the conservation needs of the species. The proposed rule designating critical habitat for a particular species is made available for public review and comment, and interested parties may comment on the scale for a specific designation.

(33) Comment: Several commenters stated that, in reaching this determination, the Services appear to conflate disparate terminology (specific areas versus occurrences) and rely upon a vague term (range) that does not adequately delineate what geographic areas are actually occupied by a species. Several commenters also requested additional explanation of the term “range.”

Our Response: Under section 3(5)(A)(i) of the Act, specific areas designated as critical habitat include those specific areas within the geographical area occupied by the species at the time the species is listed. As discussed in our proposal and this final rule, the geographical area that may generally be delineated around the species’ occurrences is synonymous with the species’ range. The term “range” used in our proposal refers to the general area currently occupied by the species at the time the listing determination is made. These areas are occupied by the species throughout all or part of the species’ life cycle, even if not used on a regular basis. Some examples we give are migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals. This scale of occupancy is different from a very narrow or limited delineation of areas of occupancy identified through presence and absence surveys for

localized occurrences of the species. We, therefore, disagree that we are using a vague term in referring to range.

(34) Comment: Several commenters including one State stated that by defining the geographical area occupied by the species as coextensive with the “range” and including multiple areas of occurrence, the Services are expanding the geographic extent of occupied habitat beyond the limits of judicial interpretation. They suggested we should define the area occupied by the species as limited to the specific location where the species occurs on a regular or consistent basis.

Our Response: We have indicated that the geographical area occupied by the species is likely to be larger than the specific areas that would then be analyzed for potential designation under section 3(5)(A)(i). We are not suggesting that the specific areas included in critical habitat should fill this area. To limit the definition to specific locations where the species occurs on a regular or consistent basis would not allow the Secretaries to designate areas that may be important for the conservation of a listed species that may only be periodically used by a species, such as breeding areas, foraging areas, and migratory corridors, thereby limiting Secretarial discretion.

(35) Comment: One State asked if the range in the geographical area occupied by the species definition refers to the historical range or the currently occupied range.

Our Response: The term “range” as indicated in our proposal refers to the generalized area currently occupied by the species at the time the listing determination is made, not the historical range.

(36) *Comment:* One State also wanted to know if land-use restrictions within the geographical area occupied by the species would be put into place in addition to the designated critical habitat.

Our Response: The revised regulations would not result in any change to land-use restrictions beyond the existing regulatory requirements under section 7 of the Act that Federal agencies consult with the Services to ensure that the actions they carry out, fund, or authorize are not likely to destroy or adversely modify critical habitat (see the final rule published elsewhere in today's *Federal Register*). The Act provides no special regulatory protections for those areas within the geographic area occupied by the species that are not designated as critical habitat, although the section 7 prohibition on jeopardy and the section 9 prohibitions may still be applicable.

(37) *Comment:* Several States disagree with the Services' interpretation of the definition of "occupied." This interpretation and inclusion of "periodic or temporary" areas will lead to a much larger consideration of critical habitat that is largely unnecessary for species recovery.

Our Response: Identifying the geographic area occupied at the time of listing is only the first step in designating critical habitat. In occupied areas, we can only designate critical habitat if one or more of the physical or biological features are present and are found to be essential to the conservation of the species and may require special management considerations or protection. The inclusion of periodic or temporary areas

would be based on the best scientific data available for the species and these areas would have to meet the criteria above.

(38) Comment: Several commenters asked what constitutes being “temporarily present?” The Services should explain that occupied areas require a demonstration of regular or consistent use within a reasonable period of time. One State commented that the Services should clarify the meaning of the terms “periodically” and “temporarily” to provide adequate guidance and set reasonable limits for potential critical habitat designations.

Our Response: We will use the best scientific data available to determine occupied areas including those that are used only periodically or temporarily by a listed species during some portion of its life history. This will be determined on a species-by-species basis, and our rationale would be explained in the proposed and final rules for these species, which would be available for public review and comment.

(39) Comment: Several commenters, including two States, were concerned about using “indirect or circumstantial” evidence to determine occupancy and questioned whether this qualified as the best scientific data available. One of the commenters asserted that the Services should only designate areas as occupied based on scientific evidence (including traditional and local knowledge) that breeding, foraging, or migratory behaviors actually occur in that location on a regular or consistent basis.

Our Response: The Services will rely on the best scientific data available in determining which specific areas were occupied at the time of listing and which of these

contain the features essential to the conservation of the species. The best available scientific data in some cases may only be indirect or circumstantial evidence. We will explain in the proposed rule designating critical habitat for a particular species if and how such evidence was used to determine occupancy and will provide the public with an opportunity to review and comment.

(40) Comment: Several commenters, including two States, asked us to define and explain “life-history needs.”

Our Response: We give a sample list of life-history needs in the rule. This list includes but is not limited to water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. The life-history needs are what the species needs throughout its different life stages to survive and thrive.

(41) Comment: One State commented that the term “sites” in the definition of “physical or biological features” is wholly ambiguous and must be defined, explained, or deleted.

Our Response: We included the term “sites” in the definition of physical or biological features to keep the same level of specificity as currently is called for in the regulations, and our current regulations list “sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal” among the examples of primary constituent elements that might be specified (50 CFR 424.12(b)(4)). The term “sites” does not need to be defined or further explained because we rely on a plain dictionary meaning of “site”: the place, scene, or point of an occurrence or event (Merriam-Webster, 2015).

(42) Comment: One State suggested that we simplify the “physical or biological features” definition as follows: “Geographic or ecological elements within a species’ range that are essential to its survival and reproduction, whether single or in combination, or necessary to support ephemeral habitats. Features may be described in conservation biology terms, including patch size and connectivity.”

Our Response: We appreciate the State providing edits to simplify the phrase; however, based on our years of experience designating critical habitat and implementing it, we find that the text in our proposal and this final rule will provide greater clarity.

(43) Comment: Several commenters, including one State, indicated that we needed a more specific delineation of what features may be considered and how they relate to the needs of the species.

Our Response: We respectfully disagree with the commenters that further clarification should be added in this revised regulation. However, we do agree that we need to clearly articulate in our proposed and final rules designating critical habitat for each species how the essential features relate to the life-history and conservation needs of the species. This type of specificity will be in the individual proposed and final rules designating critical habitat for each species. As is our general practice, we will clearly lay out the features and how they relate to the needs of the species in each rule.

(44) *Comment:* Several commenters asked us to clarify the distinction, if any, between features that support the life-history needs of the species and features that are essential to the conservation of the species.

Our Response: Our definition of physical or biological features is the first step, and we do not assume that all features are essential. In many circumstances the features that support life-history needs of the species are the features that are essential to the conservation of the species. The features that are essential to the conservation of the species are those found in the appropriate quality, quantity, and spatial and temporal arrangements in the context of the life history, status, and conservation needs of the species. This varies according to the species. For example, for a small, endemic species the features that support the life-history needs may be essential themselves, but for a wide-ranging species what rises to the level of essential features may rely more on the quality, quantity, and arrangement of those features.

(45) *Comment:* Several commenters sought an explanation for how the requisite physical and biological features would be identified, documented, and verified during the critical-habitat-designation process.

Our Response: We use the best scientific data available to determine the life-history needs of the species. The essential physical or biological features support the life-history and conservation needs of the species. A description of the essential features for each species and how they relate to its life-history and conservation needs will be articulated in the proposed and final rules designating critical habitat for a particular

species. This description of the essential features, as well as the designation that is based on them, will be available for public review and comment during the rulemaking process.

(46) *Comment:* Several commenters stated that the description of the relevant features cannot be in broad terms, but must be specific enough to limit critical habitat to the most “essential areas” and help provide an understanding of what the species actually requires to return from the brink of extinction.

Our Response: When evaluating occupied habitat, we agree that the statute requires us to determine which areas contain physical or biological features essential to the conservation of the species (that may require special management considerations or protection). In every proposed and final rule designating critical habitat for a particular species, we describe those features that we have determined to be essential and explain the basis for our determination. However, we respectfully disagree that broadly described features are necessarily inappropriate. The level of specificity in our description of the features is primarily determined by the state of the best scientific information available for that species. We will provide as much specificity as is appropriate in light of what is known about the species’ habitat needs, while recognizing that the available science may still be evolving for that species. Where the available information is still evolving, it may not be possible or necessary to provide a high level of specificity, and it may frustrate the conservation purposes of the Act to attempt to do so. *See Arizona Cattle Growers’ Ass’n v. Kempthorne*, 534 F. Supp. 2d 1013, 1025 n.2 (D. Ariz. 2008), *aff’d sub nom. Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010).

Finally, we must disagree with the commenter's suggestion that in identifying essential features the Services must identify what the species' actually requires to return from "the brink of extinction." Critical habitat is generally required for threatened species as well as endangered species. Moreover, the Services are not required to have developed a recovery plan prior to designating critical habitat for any species. *Home Builders Ass'n of Northern Cal. v. U.S. Fish and Wildlife Service*, 616 F.3d 983, 989-90 (9th Cir. 2010). Our determinations of which features are "essential" thus depend on an understanding of the species' habitat needs rather than on a specific projection of how the species could be recovered.

(47) *Comment:* Several commenters stated that the plain language of the Act limits the scope of any designated area to those features essential to the species, and does not authorize the designation of areas that may include those subsidiary characteristics that are essential for the development of the features themselves.

Our Response: We respectfully disagree and interpret the statutory language not to limit "features" to those habitat characteristics that make habitat immediately usable by the species. In other words, the physical or biological features referred to in the definition of "critical habitat" can include features that allow for the periodic development of habitat characteristics immediately usable by the species. An interpretation of "features" that referred only to immediately usable habitat would render many essential areas ineligible for designation as critical habitat, thwarting Congress's intent that designation of critical habitat should contribute to species' conservation.

We will use the best scientific data available to identify features essential to the conservation of the species and clearly identify how they relate to the life-history and conservation needs of the species. When considering what features are essential, it is sometimes necessary to allow for the dynamic nature of the habitat, such as successional stages of habitat, which could consist of old-growth habitat or habitat newly formed through disturbance events such as fire or flood events. Thus, the physical or biological features essential to the conservation of the species may include features that support the occurrence of ephemeral or dynamic habitat conditions. The example we gave in the proposed rule was a species that may require early-successional riparian vegetation in the Southwest to breed or feed. Such vegetation may exist only 5 to 15 years after a local flooding event. The necessary features, then, may include not only the suitable vegetation itself, but also the flooding events, topography, soil type, and flow regime, or a combination of these characteristics and the necessary amount of the characteristics that can result in the periodic occurrence of the suitable vegetation. The flooding event would not be a subsidiary characteristic as suggested by the commenter, but would itself be a feature necessary for the vegetation to return. So in this case, it would be a combination of features, flooding, and vegetation that would be necessary to the conservation of the species.

(48) *Comment:* Several commenters, including two States, were concerned that designating critical habitat based on the presence of certain characteristics that may be necessary to eventually support the periodic occurrence of riparian vegetation, without evidence that the vegetation would actually develop, constitutes an impermissible

reliance upon hope and speculation. They further stated that the Services must go through a separate inquiry determining why it is reasonably foreseeable to conclude that the potential critical habitat will develop the physical or biological features at some point in the future.

Our Response: We will use the best scientific data available to support the identification of features essential to the conservation of the species and clearly identify how they relate to the life-history and conservation needs of the species. When considering what features are essential, it is sometimes necessary to allow for the dynamic nature of the habitat, such as successional stages of habitat, which could consist of old-growth habitat or habitat newly formed through disturbance events such as fire or flood events. This does not constitute reliance on mere hope or speculation but is based on an understanding of the relevant ecological processes. We also disagree with the characterization of this situation as involving “potential critical habitat” that “will develop the physical or biological features at some point in the future.” Properly understood, the essential features would currently exist in these areas, even though they may not be currently manifesting the shorter-term habitat conditions immediately usable by the species. Such areas may currently meet the definition of “critical habitat” and not be merely “potential critical habitat.”

(49) Comment: Several commenters stated that the Services’ position that “most circumstances” require “special management” is inconsistent with congressional intent to narrow the definition of “critical habitat” to require a very careful analysis of what is actually needed for survival of the species. Several commenters, including two States,

also indicated that the Services must continue to make the factual determination that special management is needed as required by the Act.

Our Response: We make the determination and describe the special management considerations or protections that may be needed in the proposed and final rules designating critical habitat for each critical habitat area. However, it has been our experience that, in most circumstances, the physical or biological features essential to the conservation of endangered species may require special management considerations or protection in all areas in which they occur. This is particularly true for species that have significant habitat-based threats, which is the case for most of our listed species. The statute directs us to identify the essential physical or biological features which “may require” special management considerations or protection, a standard that suggests we should be cautious and protective. We do acknowledge that if in some areas the essential features clearly do not require special management considerations or protection, then that area does not meet this part (section 3(5)(A)(i)) of the definition of “critical habitat.” However, we expect based on our experience with designating critical habitat that these circumstances will be rare. In our proposed and final critical habitat rules, we will continue to make factual determinations as to whether special management considerations or protection may be required.

(50) Comment: Several States commented that the new interpretation of “special management considerations or protection” set out in the preamble appears to presume that areas covered by existing protection plans will actually be more likely to be designated as critical habitat, and could act as a disincentive to implementing voluntary

pre-designation conservation initiatives, in direct contravention to recent Services' policies attempting to incentivize voluntary conservation.

Our Response: We respectfully disagree. We are directed by the Act to identify areas that meet the definition of “critical habitat” (i.e., occupied areas that contain the essential physical or biological features that may require special management considerations or protection and unoccupied areas that are essential for the conservation of a species) without regard to land ownership. We also make the determination and describe the special management considerations or protections that may be needed in the proposed and final rules for each critical habitat area. The consideration of whether features in an area may require special management considerations or protection occurs independent of whether any form of management or protection occurs in the area. This does not preclude the Services from considering the exclusion of these areas under section 4(b)(2) of the Act based on conservation programs, plans, and partnerships prior to issuing the final critical habitat rule.

(51) Comment: Several commenters stated that the Services cannot designate critical habitat based on the general assertions that the area contains the essential physical or biological features. Instead, the Services must demonstrate that the relevant features are found within a specific area.

Our Response: In the first part of the definition of “critical habitat” in the Act, we are required to identify specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical or biological features essential to the conservation of the species and which may require special management

considerations or protection. In our proposed and final critical habitat rules, we identify which features occur in the area, the basis on which we are identifying them as essential features, including how they provide for the life-history and conservation needs of the species, and whether they may require special management considerations or protection. These rules will be available for public review and comment.

(52) Comment: Several commenters suggested that we remove “principles of conservation biology” from the definition of “physical and biological features.”

Our Response: We respectfully disagree. The sentence “Features may also be expressed in terms of relating to principles of conservation biology, such as patch size, distribution distances, and connectivity” explains more clearly how we may identify the features. The principles of conservation biology are generally accepted among the scientific community and consistently used in species-at-risk status assessments and development of conservation measures and programs.

(53) Comment: Several commenters requested that we add language delineating the area “around” the species occurrences, either by using a distance or a reference to the species’ natural functions in the geographic area definition.

Our Response: We are unable to determine a universal distance or a reference to the species’ natural functions that would be applicable to all species. This analysis and determination is best left to the specific critical habitat rulemaking for a given species. In those proposed and final rules, we can be specific for each species based on its life-

history needs and more precisely define the geographical area occupied by the species. The rules will be available for public review and comment.

(54) Comment: Several commenters, including one State, indicated that the proposed § 424.12(b)(2) and deletion of current 424.12(e) would relieve the Services of any requirements that they justify the designation of unoccupied habitat by demonstrating the inadequacies of occupied habitat for the conservation of the species. They further stated that this was a major departure in the law regarding designation of critical habitat.

Our Response: We respectfully disagree. The proposed rule clearly explains that the Act does not require the Services to first prove that the occupied areas are insufficient before considering unoccupied areas. The regulatory provision at 424.12(e) merely restated the requirement from the statutory definition in a different way. We will still explain based on the best scientific data available, why the unoccupied areas are essential for the conservation of the species.

(55) Comment: Several commenters pointed out that we use “no longer necessary” in the new definition of “conserve, conserving, and conservation” and the words “no longer appropriate” in the definition of “recovery” in 50 CFR 402.02. The commenters asserted that these are two different standards and that we should pick one of them.

Our Response: The words “no longer necessary” are used in the statutory definition of “conserve, conserving, and conservation” in the Act. The rule simply points

out that the concept described in the statutory language is equivalent to “recovery.” That term is defined in § 402.02, which we are not revising at this time.

(56) *Comment:* Several commenters stated that the National Marine Fisheries Service’s interpretation of the phrase “which interbreeds when mature” was upheld by the Ninth Circuit in *Modesto Irr. Dist. v. Gutierrez*, 619 F.3d 1024 (9th Cir. 2010), and that the Act also requires that a group of organisms must interbreed when mature to qualify as a distinct population segment (DPS), which is in contrast to the Services’ interpretation of the phrase in the proposed rule.

Our Response: We respectfully disagree that our interpretation of “interbreeds when mature” is at odds with the ruling in *Modesto Irrigation District*. In that case, the Ninth Circuit did not hold that actual interbreeding among different populations is required in order to include such populations in a single DPS. To the contrary, the court made it clear that Congress did not intend to create a “rigid limitation” on the Services’ discretion to define DPSs. On the “narrow issue” of whether the ESA or the DPS Policy *required* that NMFS place interbreeding steelhead and rainbow trout in the same DPS, the court deferred to NMFS’s judgment that there was no such requirement. *Id.* at 1037. While NMFS did state in the challenged rule that “[t]he ESA requirement that a group of organisms must interbreed when mature to qualify as a DPS is a necessary but not exclusive condition” (71 FR 834, 838 (Jan. 5, 2006)), nothing in the rule suggested that NMFS’s position was that *actual* interbreeding among disparate populations was required, and that biological capacity to interbreed would not be sufficient.

(57) *Comment:* Several commenters stated that the Services did in fact revise the regulations in our discussion of “interbreeds when mature” by inserting the phrase “A distinct population segment “interbreeds when mature” when it consists of members of the same species or subspecies in the wild that are capable of interbreeding when mature” to the definition of a “species.” They further stated that this was an Administrative Procedure Act violation and that the phrase should be removed in the final rule.

Our Response: The commenters are correct that we proposed to amend the definition of “species.” In the preamble we wrote, “Finally, we explain our interpretation of the meaning of the phrase ‘interbreeds when mature,’ which is found in the definition of ‘species.’... Although we are not proposing to revise the regulations at this time, we are using this notice to inform the public of our longstanding interpretation of this phrase.” Our intent was to explain how we have interpreted the phrase, but by inadvertently including this interpretation in the regulatory language of the proposed rule, we in fact were proposing to change the definition of “species” to insert, “A distinct population segment ‘interbreeds when mature’ when it consists of members of the same species or subspecies in the wild that are capable of interbreeding when mature.” We have removed the proposed language from the definition of “species” in this final rule and left only the language in the preamble. The Services are not amending the definition.

(58) *Comment:* A commenter suggested that the Services clarify the meaning of “being considered by the Secretary” in the definition of the term “candidate.” The commenter suggested that the final rule substitute the more narrow definition found in the FWS candidate species fact sheet, which states: “Candidate species are plants and

animals for which the U.S. Fish and Wildlife Service has sufficient information on their biological status and threats to propose them as endangered or threatened under the Endangered Species Act, but for which development of a proposed listing regulation is precluded by other higher priority listing activities.”

Our Response: We agree with the commenter that the statement in the FWS candidate fact sheet is an appropriate meaning of the phrase “being considered by the Secretary” found in the definition of candidate. We emphasize that we did not change the definition of “candidate” in this regulation.

Criteria for Designating Critical Habitat

(59) *Comment:* The Western Governors’ Association requested that the Services provide a thorough, data-based explanation of the basis for the determination that areas outside the range occupied at the time of listing are or will be essential habitat.

Our Response: Under section 3(5)(A)(ii) of the Act, to designate as critical habitat specific areas that are outside the geographical area occupied by the species at the time the species is listed, the Services must determine that the areas are essential for the conservation of the species. This determination must be based on the best scientific data available concerning the particular species and its conservation needs. When the Services propose to designate specific areas pursuant to section 3(5)(A)(ii), they have under the existing regulations and will under the revised regulations explain the basis for the determination, including the supporting data. Thus, the Services’ explanation will be available for public comment.

(60) Comment: Several commenters, including one State, were concerned that the essential areas in unoccupied areas may not even be suitable for the species and that this is an erroneous and unreasonable interpretation of an otherwise clear statutory statement and should be withdrawn.

Our Response: Section 3(5)(A)(ii) of the Act expressly allows for the consideration and inclusion of unoccupied habitat in a critical habitat designation if such habitat is determined to be essential for the conservation of the subject species. These areas do not have to contain the physical or biological features and are not subject to a finding that they may require special management considerations or protection. This is in contrast to what is required under the first part of the definition of “critical habitat” (section 3(5)(A)(i) of the Act) for areas occupied at the time of listing.

(61) Comment: Several commenters stated that the Services may only properly make a “not prudent” finding if there is specific information that increased poaching would result from designating critical habitat.

Our Response: We respectfully disagree with the commenters’ assertion. The current regulations (49 FR 38900; October 1, 1984, and at 50 CFR 424.12(a)(1)) allow for a determination that critical habitat is not prudent for a species if such designation would: (1) increase the degree of threat to the species through the identification of critical habitat, or (2) not be beneficial to the species. The determination that critical habitat is not prudent for a listed species is uncommon, especially given that most species are listed, in part, because of impacts to their habitat or curtailment of their range. Most “not

prudent” findings have resulted from a determination that there would be increased harm or threats to a species through the identification of critical habitat. For example, if a species was highly prized for collection or trade, then identifying specific localities of the species could render it more vulnerable to collection and, therefore, further threaten it. However, in some circumstances, a species may be listed because of factors other than threats to its habitat or range, such as disease, and the species may be a habitat generalist. In such a case, on the basis of the existing and revised regulations, it is permissible to determine that critical habitat is not beneficial and, therefore, not prudent. It is also permissible to determine that a designation would not be beneficial if no areas meet the definition of “critical habitat.”

(62) Comment: Several commenters inquired about whether the Services would revise the regulations to provide greater flexibility in defining a greater breadth of circumstances where a determination can be made that the designation of critical habitat for a species is not beneficial to its conservation and, therefore, not prudent.

Our Response: As noted above, it is permissible under the current and revised regulations to determine that designating critical habitat for a species is not beneficial and, therefore, not prudent. The text of these revised regulations further clarifies the non-exclusive list of factors the Services may consider in evaluating whether designating critical habitat is not beneficial. The inclusion of “but not limited to” to modify the statement “the factors the Services may consider include” allows for the consideration of alternative fact patterns where a determination that critical habitat is not beneficial would be appropriate. We think it is important to expressly reflect this regulatory flexibility in

the revised regulations. Nonetheless, based on the Services' history of implementing critical habitat, we anticipate that making a not-prudent determination on any fact pattern will be rare.

(63) Comment: One State commented that the Services dropped the word “probable” from the revised § 424.12(a) when talking about economic impacts and that the word should be retained in the final rule.

Our Response: We agree and have retained the word “probable” in this final rule. It is consistent with the revised final regulation in 50 CFR 424.19 (78 FR 53058) and our draft policy on exclusions under section 4(b)(2) of the Act. We note that in this context the term “probable” means reasonably likely to occur.

(64) Comment: Several commenters recommended adding after the word “threat” in the second sentence to § 424.12(a)(1)(ii), the words “sufficient to warrant listing the species as threatened or endangered.”

Our Response: While we agree with the commenters' intent, we find that adding the phrase would be redundant because we would only be making a determination as to whether critical habitat is prudent if the species was either being proposed for listing simultaneously or is already listed.

(65) Comment: Several commenters thought the Services should simply delete § 424.12(a)(1)(ii) instead of expanding it. They further stated that the Act does not require that a species currently be threatened by habitat loss before critical habitat is designated

and protected, and the spirit of the Act would not be served by the imposition of such a requirement by regulation.

Our Response: Critical habitat is a conservation tool under the Act that can provide for the regulatory protection of a species' habitat. The current regulations and the proposed revisions do not establish a requirement that a species be threatened by the modification, fragmentation, or curtailment of its range for critical habitat to be beneficial and, therefore, prudent to designate. However, the regulation and revisions establish a framework whereby if a species is listed under the Act and it is determined through that process that its habitat is not limited or threatened by destruction, modification, or fragmentation, then it may not be beneficial or prudent to designate critical habitat. While this provision is intended to reduce the burden of regulation in rare circumstances in which designating critical habitat does not contribute to conserving the species, the Services recognize the value of critical habitat as a conservation tool and expect to designate it in most cases.

(66) Comment: Several commenters stated that § 424.12(a)(2) is not consistent with the plain meaning of the Act and should be deleted from the final rule. They stated the proposed minor word changes did not improve the situation.

Our Response: The minor word changes to § 424.12(a)(2) are meant to make the language more consistent with the language in the Act. This section is necessary to inform the public as to the circumstances in which the Services will make a not-determinable finding on critical habitat and thereby invoking the 1-year extension of section 4(b)(6)(C)(ii) of the Act. 16 U.S.C. § 1533(b)(6)(C)(ii).

(67) Comment: A commenter stated that when the Services deem critical habitat as not determinable due to a lack of data for habitat analyses or lack of knowledge on biological needs of the species, the Services should regularly check for new data and/or make efforts to collect necessary data and move forward with critical habitat designations. One State also commented that critical habitat designations should only be made based on the best available scientific data and information, and in instances where data or information is lacking, the Services have an obligation to delay a designation until such time that sufficient information is acquired.

Our Response: Finding that critical habitat is not determinable only invokes a 1-year extension of the deadline for finalizing a critical habitat designation under section 4(b)(6)(C)(ii) of the Act. 16 U.S.C. § 1533(b)(6)(C)(ii). At the conclusion of the year, the Services must move forward with the designation and have no authority under the Act to further delay designation (unless we determine that designation is not prudent). We agree that critical habitat designations must only be made based on the best scientific data available as required by the Act. If we initially do not have enough data to make a critical habitat determination, then we can invoke the 1-year extension allowed under the Act. The Services use that time to gather additional data. At the end of the 1-year extension, the Services must use the best scientific data available to make the critical habitat determination.

(68) Comment: One State suggested that climate change is more appropriately addressed during a 5-year status review and the critical habitat revision process than

trying to attempt to accommodate future critical habitat by predicting areas necessary to support the species' recovery. It further asserted that the Services' proposed authority to designate areas that are currently unoccupied and which are not now necessary to support the species' recovery, but may eventually become necessary, is a vast expansion of the critical habitat program and contrary to the focus in the Act on current habitat conditions.

Our Response: We agree that 5-year status reviews and the critical habitat revision process can play important roles regarding the conservation needs of a species in response to habitat changes resulting from climate change. However, the statute as written allows for sufficient flexibility to address the effects of climate change in a critical habitat designation, and, therefore, the clarifications provided in our proposal and this final rule do not expand the Services' authority. There have been specific circumstances, as discussed in our proposal, where data have been available showing the shift in habitat use by a species in response to the effects of climate change. In those cases where the best scientific data available indicate that a species may be shifting habitats or habitat use, then it is permissible to include specific areas accommodating these changes in a designation, provided that the Services can explain why the areas meet the definition of "critical habitat." Although some such instances are based on reasonable predictions of how habitat will be used by the species in the future, they are based on determinations that the areas are currently essential to the species. In other words, we may find that an unoccupied area is currently "essential for the conservation" even though the functions the habitat is expected to provide may not be used by the species until a point in the foreseeable future. The data and rationale on which such a designation is based will be clearly articulated in our proposed rule designating critical

habitat. The Services will consider whether habitat is occupied or unoccupied when determining whether to designate it as critical habitat and use the best available scientific data on a case-by-case basis regarding the current and future suitability of such habitat for recovery of the species, and when developing conservation measures.

(69) Comment: Several commenters requested clarification of new § 424.12(e) with regard to the differences in the way the Services handle designation of critical habitat for species listed prior to the 1982 amendments to the Act versus species listed after the 1982 amendments.

Our Response: If the Services designate critical habitat for species listed prior to the 1982 amendments, the designation is procedurally treated like a revision of existing critical habitat even if critical habitat was never designated. Thus, the Services have additional options at the final rule stage with regard to a proposal to designate critical habitat for those species listed prior to 1982 that they do not have when proposing to designate habitat for other species. These include an option to make a finding that the revision “should not be made” and to extend the 12-month deadline by an additional period of up to 6 months if there is substantial disagreement regarding the sufficiency or accuracy of available data (see 16 U.S.C. 1533(b)(6)(B)(i)).

(70) Comment: Several commenters, including two States, indicated that removing references to “primary constituent elements” dramatically and unnecessarily

expands the scope of critical habitat and confuses instead of clarifies critical habitat designation, leading to more litigation.

Our Response: Removing references to “primary constituent elements” from the regulation will not result in expansion of the scope of critical habitat. Removing this phrase is not intended to substantively alter anything about the designation of critical habitat, but to eliminate redundancy in how we describe the physical or biological features. The phrase “primary constituent element” is not found in the Act and the regulations have never been clear as to how primary constituent elements relate to or are distinct from physical or biological features essential to the conservation of the species, which is the phrase used in the Act. In fact, the removal of the phrase “primary constituent elements” will alleviate the tension caused by trying to understand the relationship between the phrases. The specificity of the primary constituent elements that has been discussed in previous designations will now be discussed in the descriptions of the physical or biological features essential to the conservation of the species.

(71) Comment: Several commenters including several States were opposed to elimination of § 424.12(e) as this section is necessary and intentionally limiting and is an accurate implementation of the statutory definition and Congressional intent. Several commenters also questioned that when the Services promulgated § 424.12(e) in 1980, that we explained in the preamble to that rule that the limitation in § 424.12(e) was intended to “implement the statutory requirement” that unoccupied areas may be designated “only if necessary to ensure the conservation of the species.” The Services do

not address this prior interpretation at all, or explain why a rule that it once enacted as necessary to implement a statutory requirement is now unnecessary.

Our Response: We respectfully disagree. Section 424.12(e) did not allow us to designate unoccupied areas unless a designation limited to its present range (occupied) would be inadequate to ensure the conservation of the species. As we stated in the proposed rule, there is no suggestion in the legislative history that the Services were expected to exhaust occupied habitat before considering whether any unoccupied areas may be essential. Further, section 3(5)(A) of the Act expressly allows for the consideration and inclusion of unoccupied habitat in a critical habitat designation if such habitat is determined to be essential for the conservation of the subject species. There is no specific language in the Act that requires the Services to first prove that the inclusion of all occupied areas in a designation are insufficient to conserve the species before considering unoccupied areas. However, the existing implementing regulations state that such unoccupied habitat could only be considered if a determination was made that the Service(s) could not recover the species with the inclusion of only the occupied habitat.

We have learned from years of implementing the critical habitat provisions of the Act that often a rigid step-wise approach, i.e., first designating all occupied areas that meet the definition of “critical habitat” (assuming that no unoccupied habitat is designated) and then, only if that is not enough, designating essential unoccupied habitat, does not necessarily serve the best conservation strategy for the species and in some circumstances may result in a designation that is geographically larger, but less effective as a conservation tool. Our proposed change will allow us to consider the inclusion of occupied and unoccupied areas in a critical habitat designation following at minimum a

general conservation strategy for the species. In some cases, we have and may continue to find, that the inclusion of all occupied habitat in a designation does not support the best conservation strategy for a species. We expect that the concurrent evaluation of occupied and unoccupied areas for a critical habitat designation will allow us to develop more precise and deliberate designations that can serve as more effective conservation tools. Additionally, there is no specific language in the Act that requires the Services to first prove that the inclusion of all occupied areas in a designation are insufficient to conserve the species before considering unoccupied areas. The statutory language is sufficiently clear that it does not need explanation in the revised regulation, and, moreover, to the extent that the 1980 regulation language differs from the statutory language, it does not add any clarity.

(72) Comment: Several commenters, including one State, disagreed that unoccupied areas need not have the features essential to the conservation of the species and that the Services propose to unlawfully write this statutory requirement out of the Act. The State also pointed out that the Services' current position on this issue is distinctly contrary to the position the Services took in 1984 when the existing regulations were adopted.

Our Response: Under the second part of the definition of "critical habitat" in the Act (section 3(5)(A)(ii)), the Services are to identify specific areas outside the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. In contrast to section 3(5)(A)(i), this

provision does not mention physical or biological features, much less require that the specific areas contain the physical or biological features essential to the conservation of the species. These are two clearly distinct provisions. The unoccupied areas do not have to presently contain any of the physical or biological features, which is not a change from the way we have been designating unoccupied critical habitat (*see, e.g., Markle Interests v. USFWS*, 40 F. Supp. 3d 744 (E.D. La. 2014)).

(73) Comment: One State recommended that the Services develop a policy or metric to determine whether a particular area should be designated as critical habitat in unoccupied areas.

Our Response: This final rule explains the Services' general parameters for designating critical habitat. The details of why a specific area is determined to be essential to the conservation of the species will in part be directed by any generalized conservation strategy developed for the species, and clearly articulated in our proposed and final rules designating critical habitat. That determination is a fact-specific analysis and is based on the best available scientific data for the species and its conservation needs. The proposed rule for each critical habitat designation will be subject to public review and comment.

(74) Comment: A commenter suggested that the Services designate enough critical habitat at the time of listing to ensure that a species can recover.

Our Response: In evaluating which areas qualify as critical habitat and specific areas finalized (subject to section 4(b)(2) exclusions, see final policy published elsewhere

in today's Federal Register), we follow the statutory requirements to identify those occupied areas that contain the physical or biological features essential to the species' conservation that may require special management considerations or protection and any unoccupied areas that we determine to be essential for the species' conservation.

Designation of critical habitat is one important tool that contributes to recovery, but a critical habitat designation alone may not be sufficient to achieve recovery. Indeed, given the limited regulatory role of a critical habitat designation (i.e., through section 7's mandate that Federal agencies avoid destruction or adverse modification of critical habitat, see final rule published elsewhere in today's *Federal Register*), it is generally not possible to look to a critical habitat designation alone to ensure recovery. Also, we must designate critical habitat according to mandatory timeframes, very often prior to development of a formal recovery plan. See *Home Builders Ass'n of Northern Cal. v. U.S. Fish and Wildlife Service*, 616 F.3d 983, 989-90 (9th Cir. 2010). However, although a critical habitat designation will not necessarily ensure recovery, it will further recovery because the Services base the designation on the best available scientific information about the species' habitat needs at the time of designation. The best available information will include any generalized conservation strategy or criteria that may have been developed for the species in consultation with staff working in recovery planning and implementation to ensure collaboration, consistency, and efficiency as the Services work with the public and partners to recover a listed species.

(75) *Comment:* A commenter stated that the proposed rule clarifies that the Services have the discretion to designate critical habitat for species listed before 1978,

but does not specify when that discretion would be used. The commenter requested that the Services identify guidelines or standards for judging when to designate critical habitat for pre-1978 species.

Our Response: Whether to exercise discretion to designate critical habitat for species listed prior to 1978 is a case-specific determination dependent on the conservation needs of the species, scientific data available, and the resources available for additional rulemaking. Guidelines on this point could limit Secretarial discretion and may not allow for sufficient flexibility in furthering the conservation of a species.

(76) Comment: Several commenters were concerned that the Services must commit to using the best scientific data available when designating unoccupied areas as critical habitat.

Our Response: We are mandated by the Act to use (and are committed to using) the best scientific data available in determining any specific areas as critical habitat, regardless of occupancy.

(77) Comment: Several Tribes stated that while the Services readily acknowledge in the proposal their responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis, the proposed revision does nothing to clarify how the Services will carry out this responsibility.

Our Response: These revised regulations set forth our general practice for designating critical habitat, clarify definitions and phrases, and in general align the regulations with the statute. The revised regulations are not intended to be prescriptive in

how the Services will implement the provisions or coordinate with federally recognized Tribes that are potentially affected. However, the Services are committed to communicate and coordinate meaningfully and effectively with federally recognized Tribes concerning actions under the ESA, including the development and implementation of critical habitat for species that may occur on their lands. We rely on the requirements of S.O. 3206 to provide the guidance on how the Services will carry out this responsibility. We have often found that the best and most meaningful coordination and collaboration, including fulfilling our responsibilities under S.O. 3206, occurs between our Regional and field offices and a specific Tribe on a particular species.

(78) Comment: Several commenters were opposed to the inclusion of the proposed § 424.12(g), saying the Act makes no distinction between foreign and domestic species and requires that all listed species receive critical habitat unless doing so is not prudent or determinable.

Our Response: We respectfully disagree. Subsection (g) is a continuation of existing subsection (h), which has long codified the Services' understanding that critical habitat should not be designated outside of areas under United States jurisdiction. This interpretation is well supported. The Act makes a distinction between coordination with and implementation of the provisions of the ESA between States and local jurisdictions within the United States versus with foreign countries. Section 4(b)(1)(A), which deals with listing species, provides that the Secretary shall consult, as appropriate, not only with affected States, but also, in cooperation with the Secretary of State, with the country or countries in which the species is normally found. In contrast, section 7 of the ESA

does not include a requirement to consult with foreign governments. Further, section 8(b)(1) states that “the Secretary, through the Secretary of State, shall encourage—(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 4.” It is clear that Congress understood the distinction between implementing the ESA within the jurisdiction of the United States and implementing the ESA within the jurisdiction of foreign countries. It then follows that since Congress did not explicitly state that critical habitat shall be designated in foreign countries or that the Secretary consult, as appropriate, with foreign countries on a designation of critical habitat, then the designation of critical habitat is limited to lands within the jurisdiction of the United States.

Justice Stevens approved of the Services’ conclusion in his concurrence in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). There, he favorably noted the Service’s longstanding interpretation of the limitation of critical habitat designations to areas within the jurisdiction of the United States:

The Secretary of the Interior and the Secretary of Commerce have consistently taken the position that they need not designate critical habitat in foreign countries. See 42 Fed. Reg. 4869 (1977) (initial regulations of the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce). Consequently, neither Secretary interprets § 7(a)(2) to require federal agencies to engage in consultations to ensure that their actions in foreign

countries will not adversely affect the critical habitat of endangered or threatened species.

That interpretation is sound

Id. at 587 (Stevens, J., concurring).

(79) *Comment:* One State requested that the Services include a new § 424.12(e) that requires that designation will be made after consultation with the affected States. It would read, “In designating any area as critical habitat, the Secretary shall consult with affected States (those in which the proposed critical habitat is located or those that may be affected by the designation of the habitat) prior to completing the designation, and the fact of and finding of such consultation shall be addressed in the final rulemaking for the designation.”

Our Response: The suggested new § 424.12(e) is not necessary because section 4(b)(5)(A)(ii) of the Act requires the Secretary to give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction. Further, section 4(i) of the Act requires the Secretary to provide a written justification for adopting regulations in conflict with the agency’s comments or for failing to adopt a regulation as requested in a State petition. In addition to these requirements, the Services are committed to continuing to work with the States early in the process to ensure that we are using the best scientific data available.

(80) Comment: One State requested clarification on the application of this regulation to critical habitat designations that are currently under way, but not yet finalized.

Our Response: As indicated in **DATES** above, although effective 30 days from the date of publication, the revised version of § 424.12 will apply only to rulemakings for which the proposed rule is published after that date. Thus, the prior version of § 424.12 will continue to apply to any rulemakings for which a proposed rule was published before that date. However, because many of the revisions merely codify or explain our existing practices and interpretations, we may immediately refer to and act consistent with the amended language of § 424.12 in final rules to which the prior version applies.

(81) Comment: Several commenters objected to the Services' determination that a regulatory flexibility analysis is not required for this regulation, stating the regulated community is affected by this regulation.

Our Response: We respectfully disagree. We interpret the Regulatory Flexibility Act, as amended, to require that Federal agencies evaluate the potential incremental impacts of rulemaking only on those entities directly regulated by the rulemaking itself and, therefore, not on indirectly regulated entities. Recent case law supports this interpretation (https://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf, pages 22-23). NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that designate critical habitat, and this rule pertains to the procedures for carrying out those designations. No external entities, including any small businesses,

small organizations, or small governments, will experience any direct economic impacts from this rule.

We understand that there is considerable confusion as to how these revisions to the regulation will change the process for designating critical habitat, with many thinking it will greatly expand our designations and provide less clarity to the process. We went to great effort in our proposal and further in this final rule to explain that revised regulations will not result in any significant deviation from how the two agencies have been designating critical habitat. Our intent is to codify what we have been doing for many years and provide common-sense revisions based on lessons learned and relevant case law. It is our expectation that these revisions will allow us to develop more precise and deliberate designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing regulatory burdens where not necessary. As a consequence, we find, as iterated above, that NMFS and FWS are the only entities directly regulated by these revisions and that an RFA analysis is not required.

(82) Comment: We received several comments that the proposed revised regulations constituted a major Federal action because they will result in significant socioeconomic consequences and these impacts must be analyzed under the National Environmental Policy Act of 1969 (NEPA).

Our Response: As detailed in the REQUIRED DETERMINATIONS section below, we have determined that this action qualifies for a categorical exclusion under both DOI and NOAA governing procedures.

Final Amendments to Regulations Discussion of Changes to Part 424

This final rule revises 50 CFR 424.01, 424.02, and 424.12 (except for paragraph (c)) to clarify the procedures and criteria used for designating critical habitat, addressing in particular several key issues that have been subject to frequent litigation.

In finalizing the specific changes to the regulations that follow, and setting out the accompanying clarifying discussion in this preamble, the Services are establishing prospective standards only. As indicated in **DATES** above, although effective 30 days from the date of publication, the revised version of § 424.12 will apply only to rulemakings for which the proposed rule is published after that date. Thus, the prior version of § 424.12 will continue to apply to any rulemakings for which a proposed rule was published before that date. However, because many of the revisions merely codify or explain our existing practices and interpretations, we may immediately refer to and act consistent with the amended language of § 424.12 in final rules to which the prior version applies. Nothing in these final revised regulations is intended to require that any previously completed critical habitat designation must be reevaluated on this basis.

Section 424.01 Scope and purpose.

We are making minor revisions to this section to update language and terminology. The first sentence in section § 424.01(a) is being revised to remove reference to critical habitat being designated or revised only “where appropriate.” This

wording implied a greater flexibility regarding whether to designate critical habitat than is correct. Circumstances in which we determine critical habitat designation is not prudent are rare. Therefore, the new language removes the phrase “where appropriate.” Other revisions to this section are minor word changes to use more plain language or track the statutory language.

Section 424.02 Definitions.

This section of the regulations defines terms used in the context of section 4 of the Act. We are making revisions to § 424.02 to update it to current formatting guidelines, to revise several definitions related to critical habitat, to delete definitions that are redundant with statutory definitions, and to add two newly defined terms. Section 424.02 is currently organized with letters as paragraph designation for each term (e.g., § 424.02(b) *Candidate*). The Office of the **Federal Register** now recommends setting out definitions in the CFR without paragraph designations. We propose to revise the formatting of the entire section accordingly. Discussion of the revised definitions and newly defined terms follows. We note where these final revisions differ from those set out in the proposed rule.

We note that, although revising the formatting of the section requires that the entirety of the section be restated in the final-amended-regulation section, we are not at this time revisiting the text of those existing definitions that we are not specifically revising, including those that do not directly relate to designating critical habitat. In particular, we are not in this rulemaking amending the definitions of “plant,” “wildlife,”

or “fish and wildlife” to reflect changes in taxonomy since the ESA was enacted in 1973. In 1973, only the Animal and Plant Kingdoms of life were universally recognized by science, and all living things were considered to be members of one of these kingdoms. Thus, at enactment, the ESA applied to all living things. Advances in taxonomy have subsequently split additional kingdoms from these two. Any species that was considered to be a member of the Animal or Plant Kingdoms in 1973 will continue to be treated as such for purposes of the administration of the Act regardless of any subsequent changes in taxonomy. We may address this issue in a future rulemaking relating to making listing determinations (as opposed to designating critical habitat). In the meantime, the republication of these definitions here should not be viewed as an agency determination that these definitions reflect the scope of the Act in light of our current understanding of taxonomy.

The current regulations include a definition for “Conservation, conserve, and conserving.” We are revising the title of this entry to “Conserve, conserving, and conservation,” changing the order of the words to conform to the statute. Additionally, we are revising the first sentence of the definition to include the phrase “i.e., the species is recovered” to clarify the link between conservation and recovery of the species. The statutory definition of “conserve, conserving, and conservation” is “to use and the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which measures provided pursuant to the Act are no longer necessary.” This is the same concept as the definition of “recovery” found in § 402.02: “improvement in the status of listed species to the point at which listing is no longer

appropriate.” The Services, therefore, view “conserve, conserving, and conservation” as a process culminating at the point at which a species is recovered.

We are deleting definitions for “critical habitat,” “endangered species,” “plant,” “Secretary,” “State Agency,” and “threatened species” because these terms are defined in the Act and the existing regulatory definitions do not add meaning to the terms.

We also define the previously undefined term “geographical area occupied by the species” as: “the geographical area which may generally be delineated around the species’ occurrences, as determined by the Secretary (i.e., range). Such areas may include those areas used throughout all or part of the species’ life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).” This term appears in the definition of “critical habitat” found in section 3(5)(A)(i) and (ii) of the Act, but is not defined in the Act or in our current regulations. The inclusion of this new regulatory definition reflects the Services’ efforts to clarify the critical-habitat-designation process.

The definition of “critical habitat” in the Act has two parts, section 3(5)(A)(i) and (ii), which establish two distinct categories of critical habitat, based on species occupancy in an area at the time of listing. Therefore, to identify specific areas to designate as critical habitat, we must first determine what area constitutes the “geographical area occupied by the species at the time of listing,” which is the language used in the Act. The scale of this area is likely to be larger than the specific areas that would then be analyzed for potential designation under section 3(5)(A)(i). This is because the first part of the critical habitat definition in the Act directs the Services to identify “specific areas within” the geographical area occupied by the species at time of listing. This intentional choice

to use more narrow terminology alongside broader terminology suggests that the “geographical area” was expected most often to be a larger area that could encompass multiple “specific areas.” Thus, we find the statutory language supports the interpretation of equating the geographical area occupied by the species to the wider area around the species’ occurrences at the time of listing. A species’ occurrence is a particular location in which members of the species are found throughout all or part of their life cycle. The geographic area occupied by the species is thus the broader, coarser-scale area that encompasses the occurrences, and is what is often referred to as the “range” of the species.

In the Act, the term “geographical area occupied by the species” is further modified by the clause “at the time it is listed.” However, if critical habitat is being designated or revised several years after the species was listed, it can be difficult to discern what was occupied at the time of listing. The known distribution of a species can change after listing for many reasons, such as discovery of additional localities, extirpation of populations, or emigration of individuals to new areas. In many cases, information concerning a species’ distribution, particularly on private lands, is limited as surveys are not routinely carried out on private lands unless performed as part of an environmental analysis for a particular development proposal. Even then, such surveys typically focus on listed rather than unlisted species, so our knowledge of a species’ distribution at the time of listing in these areas is often limited and the information in our listing rule may not detail all areas occupied by the species at that time.

Thus, while some of these changes in a species’ known distribution reflect changes in the actual distribution of the species, some reflect only changes in the quality

of our information concerning distribution. In these circumstances, the determination of which geographic areas were occupied at the time of listing may include data developed since the species was listed. This interpretation was supported by a recent court decision, *Otay Mesa Property L.P. v. DOI*, 714 F. Supp. 2d 73 (D.D.C. 2010), *rev'd on other grounds*, 646 F.3d 914 (D.C. Cir. 2011) (San Diego fairy shrimp). In that decision, the judge noted that the clause “occupied at the time of listing” allows FWS to make a post-listing determination of occupancy based on the currently known distribution of the species in some circumstances. Although the D.C. Circuit disagreed with the district court that the record contained sufficient data to support the FWS’ determination of occupancy in that case, the D.C. Circuit did not express disagreement with (or otherwise address) the district court’s underlying conclusion that the Act allows FWS to make a post-listing determination of occupancy if based on adequate data. The FWS acknowledges that to make a post-listing determination of occupancy we must distinguish between actual changes to species occupancy and changes in available information. For succinctness, herein and elsewhere we refer to areas as “occupied” when we mean “occupied at the time of listing.”

The second sentence of the definition for “geographical area occupied by the species” clarifies that the meaning of the term “occupied” includes specific areas that are used only periodically or temporarily by a listed species during some portion of its life history, and is not limited to those areas where the listed species may be found more or less continuously. Areas of periodic use may include, for example, breeding areas, foraging areas, and migratory corridors. The Ninth Circuit recently supported this interpretation by FWS, holding that a determination that a species was likely to be

temporarily present in the areas designated as critical habitat was a sufficient basis for determining those areas to be occupied, even if the species was not continuously present. *Arizona Cattle Growers' Assoc. v. Salazar*, 606 F.3d 1160 (9th Cir. 2010) (Mexican spotted owl).

Nonetheless, periodic use of an area does not include use of habitat in that area by vagrant individuals of the species who wander far from the known range of the species. Occupancy by the listed species must be based on evidence of regular periodic use by the listed species during some portion of the listed species' life history. However, because some species are difficult to survey or we may otherwise have incomplete survey information, the Services will rely on the best available scientific data, which may in some cases include indirect or circumstantial evidence, to determine occupancy. We further note that occupancy does not depend on identifiable presence of adult organisms. For example, periodical cicadas occupy their range even though adults are only present for 1 month every 13 or 17 years. Similarly, the presence (or reasonably determined presence) of eggs or cysts of fairy shrimp or seed banks of plants constitute occupancy even when mature individuals are not present.

We also finalize a definition for the term "physical or biological features." This phrase is used in the statutory definition of "critical habitat" to assist in identifying the specific areas within the entire geographical area occupied by the species that can be considered for designation as critical habitat. We define "physical or biological features" as "the features that support the life-history needs of the species, including but not limited to water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more

complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.”

The definition clarifies that physical and biological features can be the features that support the occurrence of ephemeral or dynamic habitat conditions. For example, a species may require early-successional riparian vegetation in the Southwest to breed or feed. Such vegetation may exist only 5 to 15 years after a local flooding event. The necessary features, then, may include not only the suitable vegetation itself, but also the flooding events, topography, soil type, and flow regime, or a combination of these characteristics and the necessary amount of the characteristics that can result in the periodic occurrence of the suitable vegetation. Thus, the Services could conclude that essential physical or biological features exist in a specific area even in the temporary absence of suitable vegetation, and could designate such an area as critical habitat if all of the other applicable requirements were met and if there were documented occurrences of the particular habitat type in the area and a reasonable expectation of that habitat occurring again.

In *Cape Hatteras Access Preservation Alliance v. DOI*, 344 F. Supp. 2d 108, 123 n.4 (D.D.C. 2004), the court rejected FWS’ designation for the piping plover as including lands that did not currently contain the features defined by FWS, but noted that it was not addressing “whether dynamic land capable of supporting plover habitat can itself be one of the ‘physical or biological features’ essential to conservation.” The new definition for “physical or biological features” clarifies that features can be dynamic or ephemeral

habitat characteristics. However, an area within the geographical area occupied by the species, containing habitat that is not ephemeral by nature but that has been degraded in some way, must have one or more of the physical or biological features at the time of designation.

Having defined “physical or biological features,” we are also removing the term “primary constituent element” and all references to it from the regulations in § 424.12. As with all other aspects of these revisions, this will apply only to future critical habitat designations and is further explained below in the discussion of the changes to § 424.12, where the term is currently used.

We are also revising the definition of “special management considerations or protection” which is found in § 424.02. Here we remove the phrase “of the environment” from the current regulation. This phrase is not used in this context elsewhere in the regulations or the Act and, therefore, may create ambiguity. We also insert the words “essential to” to conform to the language of the Act.

In determining whether an area has essential features that may require special management considerations or protection, the Services do not base their decision on whether management is currently in place or whether that management is adequate. FWS formerly took the position that special management considerations or protection was required only if whatever management was in place was inadequate and that *additional* special management was needed. This position was rejected by the court in *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003) (Mexican spotted owl), the only court to address this issue. The Services agree with the conclusion of the court on this point—it is incorrect to read the statute as asking whether *additional* special

management considerations or protection may be required. The evaluation of whether features in an area may require special management considerations or protection occurs independent of whether any form of management or protection occurs in the area.

We expect that, in most circumstances, the physical or biological features essential to the conservation of endangered species may require special management in all areas in which they occur, particularly for species that have significant habitat-based threats. However, if in some areas the essential features do not require special management consideration or protection because there are no applicable threats to the features that have to be managed or protected for the conservation of the species, then that area does not meet this part (section 3(5)(A)(i)) of the definition of “critical habitat.” Nevertheless, we expect such circumstances to be rare.

Furthermore, it is not necessary that a feature currently *requires* special management considerations or protection, only that it *may require* special management to meet the definition of “critical habitat.” 16 U.S.C. 1532(5)(A)(i) (emphasis added). Two district court decisions have emphasized this point. *CBD v. Norton* (Mexican spotted owl); *Cape Hatteras Access Preservation Alliance v. DOI*, 344 F. Supp. 2d 108 (D.D.C. 2004) (piping plover). The legislative history supports the view that Congress purposely set the standard as “may require.” Earlier versions of the bills that led to the statutory definition of “critical habitat” used the word “requires,” but “may require” was substituted prior to final passage. In any case, an interpretation of a statute should give meaning to each word Congress chose to use, and our interpretation gives the word “may” meaning.

Finally, we explain our interpretation of the meaning of the phrase ‘interbreeds when mature,’ which is found in the definition of ‘species.’ The “interbreeds when mature” language is ambiguous (*Modesto Irrigation Dist. v. Gutierrez*, 619 F.3d 1024, 1032 (9th Cir. 2010)). Although we are not revising the regulatory definition of “species” at this time, we are using this notice to inform the public of our interpretation of this phrase.” We have always understood the phrase “interbreeds when mature” to mean that a DPS consists of members of the same species or subspecies that when in the wild would be biologically capable of interbreeding if given the opportunity, but all members need not actually interbreed with each other. A DPS is a subset of a species or subspecies, and cannot consist of members of different species or subspecies. The “biological species” concept, which defines species according to a group of organisms’ actual or potential ability to interbreed, and their relative reproductive isolation from other organisms, is one widely accepted approach to defining species. We interpret the phrase “interbreeds when mature” to reflect this understanding and to signify only that a DPS must be composed solely of members of the same species or subspecies. As long as this requirement is met, a DPS may include multiple groups of vertebrate organisms that do not actually interbreed with each other. For example, a DPS may consist of multiple groups of a fish species separated into different drainages. While it is possible that the members of these groups do not actually interbreed with each other, their members are biologically capable of interbreeding.

Our intent was to explain how we have interpreted the phrase, but by inadvertently including this interpretation in the regulatory language of the proposed rule, we in fact were proposing to change the definition of “species” to insert, “A distinct

population segment ‘interbreeds when mature’ when it consists of members of the same species or subspecies in the wild that are capable of interbreeding when mature.” We have removed the proposed language from the definition of “species” in this final rule and left only the language in this preamble. We also noticed that we inadvertently left out the word “Includes” from the definition of “species” in our proposed regulation. We have restored the word “Includes” in this final regulation to match the definition of “species” found in our 1984 regulation. The Services are not substantively amending the definition at this time.

Section 424.12 Criteria for designating critical habitat.

We are revising the first sentence of paragraph (a) to clarify that critical habitat shall be proposed and finalized “to the maximum extent prudent and determinable ... concurrent with issuing proposed and final listing rules, respectively.” The language of the existing regulation is “shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing.” We added the words “proposed and finalized” to be consistent with the Act, which requires that critical habitat be finalized concurrent with listing to the maximum extent prudent and determinable. The existing language could be interpreted to mean *proposing* critical habitat concurrent with listing was the only requirement. Additionally, the existing phrase “shall be specified” is vague and not consistent with the requirement of the Act, which is to propose and finalize a designation of critical habitat. The last two sentences in paragraph (a) contain minor language changes to use the active voice.

Paragraphs (a)(1) and (a)(1)(i) are not changed.

The first sentence of paragraph (a)(1)(ii) remains the same. However, we add a second sentence to paragraph (a)(1)(ii) to provide examples of factors that we may consider in determining whether a designation would not be beneficial to the species. A designation may not be beneficial and, therefore, not prudent, under certain circumstances, including but not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether no areas meet the definition of "critical habitat." For example, this provision may apply to a species that is threatened primarily by disease but the habitat that it relies upon continues to exist unaltered throughout an appropriate distribution that, absent the impact of the disease, would support conservation of the species. Another example is a species that occurs in portions of the United States and a foreign nation. In the foreign nation, there are multiple areas that have the features essential to the conservation of the species; however, in the United States there are no such areas. Consequently, there are no areas within the United States that meet the definition of "critical habitat" for the species. Therefore, there is no benefit to designation of critical habitat, and designation is not prudent.

While this provision is intended to reduce the burden of regulation in rare circumstances in which designation of critical habitat does not contribute to the conservation of the species, the Services recognize the value of critical habitat as a conservation tool and expect to designate it in most cases.

Section 424.12(a)(2) remains unchanged from the current regulation, and subparagraphs (i) and (ii) contain minor language changes to be consistent with the language in the Act.

The Services are completely revising § 424.12(b) of the current regulations. For the reason explained below, we also remove the terms “principal biological or physical constituent elements” and “primary constituent elements” from this section. These concepts are replaced by the statutory term “physical or biological features,” which we define as described above.

The first part of the statutory definition of “critical habitat” (section 3(5)(A)(i)) contains terms necessary for (1) identifying specific areas within the geographical area occupied by the species that may be considered for designation as critical habitat and (2) describing which features on those areas are essential to the conservation of species. In addition, current § 424.12(b) introduced the phrase “primary constituent elements.” However, the regulations are not clear as to how primary constituent elements relate to or are distinct from physical or biological features, which is the term used in the statute. Adding a term not found in the statute that is at least in part redundant with the term “physical or biological features” has proven confusing. Trying to parse features into elements and give them meaning distinct from one another has added an unnecessary layer of complication and confusion during the designation process.

The definition of “physical or biological features,” described above, encompasses similar habitat characteristics as currently described in § 424.12(b), such as roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide,

and specific soil types. Our proposal is intended to simplify and clarify the process, and to remove redundancy, without substantially changing the manner in which critical habitat is designated. The Services still expect to provide a comparable level of detail and specificity in defining and describing physical or biological features essential to the conservation of a species.

Section 424.12(b) describes the process to be used to identify the specific areas to be considered for designation as critical habitat, based on the statutory definition of “critical habitat.” With respect to both parts of the definition, the revised regulations emphasize that the Secretary will identify areas that meet the definition “at a scale determined by the Secretary to be appropriate.” The purpose of this language is to clarify that the Secretary cannot and need not make determinations at an infinitely fine scale. Thus, the Secretary need not determine that each square inch, square yard, acre, or even square mile independently meets the definition of “critical habitat.” Nor will the Secretary necessarily consider legal property lines in making a scientific judgment about what areas meet the definition of “critical habitat.” Instead, the Secretary has discretion to determine at what scale to do the analysis. In making this determination, the Secretary may consider, among other things, the life history of the species, the scales at which data are available, and biological or geophysical boundaries (such as watersheds), and any draft conservation strategy that may have been developed for the species.

Under the first part of the statutory definition, in identifying specific areas for consideration, the Secretary must first identify the geographical area occupied by the species at the time of listing. Within the geographical area occupied by the species, the Secretary must identify the specific areas on which are found those physical or biological

features (1) essential to the conservation of the species, and (2) which may require special management considerations or protection.

Under § 424.12(b)(1)(i), the Secretary will identify the geographical area occupied by the species using the new regulatory definition of this term. Under § 424.12(b)(1)(ii), the Secretary will then identify those physical and biological features essential to the conservation of the species. These physical or biological features are to be described at an appropriate level of specificity, based on the best scientific data available at the time of designation. For example, physical features might include gravel of a particular size required for spawning, alkali soil for germination, protective cover for migration, or susceptibility to flooding or fire that maintains early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a maximum level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic needed to support the life history of the species. For example, a feature may be a specific type of forage grass that is in close proximity to a certain type of shrub for cover. Because the species would not consume the grass if there were not the nearby shrubs in which to hide from predators, one of these characteristics in isolation would not be an essential feature; the feature that supports the life-history needs of the species would consist of the combination of these two characteristics in close proximity to each other.

In considering whether features are essential to the conservation of the species, the Services may consider an appropriate quality, quantity, and spatial and temporal

arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. For example, a small patch of meadow may have the native flowers, full sun, and a biologically insignificant level of invasive ants that have been determined to be important habitat characteristics that support the life-history needs of an endangered butterfly. However, that small patch may be too far away from other patches to allow for mixing of the populations, or the meadow may be too small for the population to persist over time. So the area could have important characteristics, but those characteristics may not contribute to the conservation of the species because they lack the appropriate size and proximity to other meadows with similar characteristics. Conversely, the exact same characteristics (native flowers, full sun, and a biologically insignificant level of invasive ants), when combined with the additional characteristics of larger size and short dispersal distance to other meadows, may in total constitute a physical or biological feature essential to the conservation of the species.

Under § 424.12(b)(1)(iii), the Secretary will then determine the specific areas within the geographical area occupied by the species on which are found those physical or biological features essential to the conservation of the species.

Section 424.12(b)(1)(iv) provides for the consideration of whether those physical or biological features may require special management considerations or protection. In this portion of the analysis, the Secretary must determine whether there are any “methods or procedures useful in protecting physical and biological features for the conservation of listed species.” Only those physical or biological features that may be in need of special management considerations or protection are considered further. The Services may

conduct this analysis for the need of special management considerations or protection at the scale of all specific areas, but they may also do so within each specific area.

The “steps” outlined in subparagraphs (i) through (iv) above are not necessarily intended to be applied strictly in a stepwise fashion. The instructions in each subparagraph must be considered, as each relates to the statutory definition of “critical habitat.” However, there may be multiple pathways in the consideration of the elements of the first part of the definition of “critical habitat.” For instance, one may first identify specific areas occupied by the species, then identify all features needed by a species to carry out life-history functions in those areas through consideration of the conservation needs of the species, and then determine which of those specific areas contain the features essential to the conservation of the species. The determination of which features are essential to the conservation of the species may consider the spatial arrangement and quantity of such features in the context of the life history, status, and conservation needs of the species. In some circumstances, not every location that contains one or more of the habitat characteristics that a species needs will be designated as critical habitat. Some locations may have important habitat characteristics, but are too small to support a population of the species, or are located too far away from other locations to allow for genetic exchange. Considered in context of any generalized conservation strategy that might be developed for the species, § 424.12(b)(1)(i) through (iv) will allow for sufficient flexibility to determine what areas within the geographical area occupied by the species are needed to provide for the conservation of the species.

Occasionally, new taxonomic information may result in a determination that a previously listed species or subspecies is actually two or more separate entities. In such

an instance, the Services must have flexibility, when warranted, to continue to apply the protections of the Act to preserve the conservation value of critical habitat that has been designated for a species listed as one listable entity (i.e., species, subspecies, or distinct population segment (DPS)), and which is being repropose for listing as one or more different listable entities (*e.g.*, when the Services propose to list two or more species, subspecies, or DPSs that had previously been listed as a single entity). Where appropriate (such as where the range of an entity proposed for listing and a previously designated area of critical habitat align), the Services have the option to find, simultaneously with the proposed listing of the proposed entity or entities, that the relevant geographic area(s) of the existing designation continues to apply as critical habitat for the new entity or entities. Such a finding essentially carries forward the existing critical habitat (in whole or in part). Alternatively, the Services have the option to pursue a succinct and streamlined notice of proposed rulemaking to carry forward the existing critical habitat (in whole or in part), which draws, as appropriate, from the existing designation.

More broadly, when applying § 424.12(b)(1) to the facts relating to a particular species, the Services will usually have more than one option available for determining what specific areas constitute the critical habitat for that species. In keeping with the conservation-based purpose of critical habitat, the relevant Service may find it best to first consider broadly what it knows about the biology and life history of the species, the threats it faces, the species' status and condition, and, therefore, the likely conservation needs of the species with respect to habitat. If there already is a recovery plan for that species (which is not always the case and not a prerequisite for designating critical habitat), then that plan would be useful for this analysis.

Using principles of conservation biology such as the need for appropriate patch size, connectivity of habitat, dispersal ability of the species, or representation of populations across the range of the species, the Services may evaluate areas needed for the conservation of the species. The Services must identify the physical and biological features essential to the conservation of the species and unoccupied areas that are essential for the conservation of the species. When using this methodology to identify areas within the geographical area occupied by the species at the time of listing, the Services will expressly translate the application of the relevant principles of conservation biology into the articulation of the features. Aligning the physical and biological features identified as essential with the conservation needs of the species and any conservation strategy that may have been developed for the species allows us to develop more precise designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing regulatory burdens where not necessary.

We note that designation of critical habitat relies on the best available scientific data at the time of designation. The Services may not know of, or be able to identify, all of the areas on which are found the features essential to the conservation of a species. After designation of final critical habitat for a particular species, the Services may become aware of or identify other features or areas essential to the conservation of the species, such as through 5-year reviews and recovery planning. Newly identified features that are useful for characterizing the conservation value of designated critical habitat can be considered in consultations conducted under section 7(a)(2) of the Act as part of the best available scientific and commercial data. We also note that if there is uncertainty as to whether an area was “within the geographical area occupied by the species, at the time

it is listed,” the Services may in the alternative designate the area under the second part of the definition if the relevant Service determines that the area is essential for the conservation of the species.

The second part of the statutory definition of “critical habitat” (section 3(5)(A)(ii)) provides that areas outside the geographical area occupied by the species at the time of listing should be designated as critical habitat if they are determined to be “essential for the conservation of the species.” Section 424.12(b)(2) further describes the factors the Services will consider in identifying any areas outside the geographical area occupied by the species at the time of listing that may meet this aspect of the definition of “critical habitat.” Under § 424.12(b)(2), the Services will determine whether unoccupied areas are essential for the conservation of the species by considering “the life-history, status, and conservation needs of the species.” This will be further informed by any generalized conservation strategy, criteria, or outline that may have been developed for the species to provide a substantive foundation for identifying which features and specific areas are essential to the conservation of the species and, as a result, the development of the critical habitat designation.

Section 424.12(b)(2) subsumes and supersedes § 424.12(e) of the existing regulations. Existing section 424.12(e) provides that the Secretary shall designate areas outside the “geographical area presently occupied by a species” only when “a designation limited to its present range would be inadequate to ensure the conservation of the species.” Although the existing provision represents one reasonable approach to giving meaning to the term “essential” as it relates to unoccupied areas, the Services find, based on years of applying the existing regulations, that this provision is both unnecessary and

unintentionally limiting. While Congress supplied two different standards to govern the Secretary's designation of these two types of habitat, there is no suggestion in the legislative history that the Services were expected to exhaust occupied habitat before considering whether any unoccupied area may be essential. In addition, although section 3(5)(C) of the Act reflects Congressional intent that a designation generally should not include every area that the species *can* occupy, this does not necessarily translate into a mandate to avoid designation of any unoccupied areas unless relying on occupied areas alone would be insufficient. Indeed, there may be instances in which particular unoccupied habitat is more important to the conservation of the species than some occupied habitat.

For example, a species may occupy at low densities a large amount of habitat that is marginal habitat for the species. That marginal habitat may nonetheless meet the definition of "critical habitat" because the species has been extirpated from what historically was superior habitat, and it is possible to recover the species if all of the marginal habitat is thoroughly protected. However, a more certain and efficient path to recovery may involve the protection of a relatively small subset of the marginal habitat combined with protection of some of the superior habitat (allowing for natural expansion or artificial reintroduction). A variation of this scenario would involve habitat that may currently be of high quality, but is unlikely to remain that way due to the effects of climate change. Given these scenarios, it will be useful for the Services to retain the flexibility to consider various paths to recovery in considering what areas to designate as critical habitat.

We conclude that a rigid step-wise approach, i.e., first designating all occupied areas that meet the definition of “critical habitat” (assuming that no unoccupied habitat is designated) and then, only if that is not enough, designating essential unoccupied habitat, does not necessarily serve the best conservation strategy for the species and, in some circumstances, may result in a designation that is geographically larger but less effective as a conservation tool. Deleting current § 424.12(e) will allow us to consider including occupied and unoccupied areas in a critical habitat designation and to follow any general conservation strategy, criteria, or outline for the species that may be developed. We expect that the concurrent evaluation of occupied and unoccupied areas for a critical habitat designation will allow us to develop more precise designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing regulatory burdens where not necessary.

In addition, the existing regulatory provision is unnecessary because the Secretary in any case must find that the unoccupied area is “essential.” In many cases the Secretary may conclude that an integral part of analyzing whether unoccupied areas are essential is to begin with the occupied areas, but the Act does not require the Services to first prove that the occupied areas are insufficient before considering unoccupied areas. Therefore, we conclude that deleting existing § 424.12(e) restores the two parts of the statutory definition (for occupied and unoccupied areas) to the relationship envisioned by Congress.

As it is currently written, the provision in § 424.12(e) also confusingly references *present* range, while the two parts of the statutory definition refer to the area occupied *at the time of listing*. In practice, these concepts may be largely the same, given that critical

habitat ideally should be designated at or near the time of listing. Nevertheless, the Services find that it will reduce confusion to change the regulations to track the statutory distinction. In addition, because critical habitat may be revised at any time, the statutory distinction may be important during a revision, which could occur several years after the listing of the species.

However, we note that unoccupied areas must be essential for the conservation of the species, but need not have the features essential to the conservation of the species: This follows directly from the inclusion of the “features essential” language in section 3(5)(A)(i) but not in section 3(5)(A)(ii). Thus, even keeping in mind that “features” may include features that support the occurrence of ephemeral or dynamic habitat conditions, the Services may identify as areas essential to the conservation of the species areas that do not yet have the features, or degraded or successional areas that once had the features, or areas that contain sources of or provide the processes that maintain essential features in other areas. Areas may develop features over time, or, through special management considerations or protection. The conservation value may be influenced by the level of effort needed to manage degraded habitat to the point where it could support the listed species. Under § 424.12(b)(2), the Services will identify unoccupied areas, either with the features or not, that are essential for the conservation of a species. This section is intended to provide a flexible, rather than prescriptive, standard to allow the Services to tailor the inquiry about what is essential to the specific characteristics and circumstances of the particular species.

The Services anticipate that critical habitat designations in the future will likely increasingly use the authority to designate specific areas outside the geographical area

occupied by the species at the time of listing following any generalized conservation strategy that might be developed for the species. As the effects of global climate change continue to influence distribution and migration patterns of species, the ability to designate areas that a species has not historically occupied is expected to become increasingly important. For example, such areas may provide important connectivity between habitats, serve as movement corridors, or constitute emerging habitat for a species experiencing range shifts in latitude or altitude (such as to follow available prey or host plants). Where the best available scientific data suggest that specific unoccupied areas are, or it is reasonable to determine from the record that they will eventually become, necessary to support the species' recovery, it may be appropriate to find that such areas are essential for the conservation of the species and thus meet the definition of "critical habitat."

An example may clarify this situation: A butterfly depends on a particular host plant. The host plant is currently found in a particular area. The data show the host plant's range has been moving up slope in response to warming temperatures (following the cooler temperatures) resulting from the effects of climate change. Other butterfly species have been documented to have shifted from their historical ranges in response to changes in the range of host plants. Therefore, we rationally conclude that the butterfly's range will likely move up slope, and we would designate specific areas outside the geographical area occupied by the butterfly at the time it was listed if we concluded this area was essential based on this information.

Adherence to the process described above will ensure compliance with the requirement in section 3(5)(C) of the Act, which states that, except in those circumstances

determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

Existing § 424.12(c) resulted from a recent separate rulemaking (77 FR 25611; May 1, 1012); it is not addressed in this rulemaking.

Section 424.12(d) includes minor language changes and removes the example as it is not necessary for the text of the regulation.

We are removing current § 424.12(e), as this concept—designating specific areas outside the geographical area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species—is captured in revised § 424.12(b)(2).

We are redesignating the current § 424.12(f) as § 424.12(e) and adding a second sentence to emphasize that designation of critical habitat for species that were listed prior to 1978 is at the discretion of the Secretaries. The first sentence of § 424.12(e) provides that the Secretary “may designate critical habitat for those species listed as threatened or endangered species but for which no critical habitat has been previously designated.” This is substantially the same as current § 424.12(f) in the existing regulations, although the Services have changed the passive voice to the active voice.

The new second sentence codifies in the regulations the principle that the decision whether to designate critical habitat for species listed prior to the effective date of the 1978 Amendments to the Act (November 10, 1978) is at the discretion of the Secretary. This principle is clearly reflected in the text of the statute and firmly grounded in the legislative history. The definition of “critical habitat” added to the Act in 1978 provided that the Secretary “may,” but was not required to, establish critical habitat for species

already listed by the effective date of the 1978 amendments. *See* Pub. L. No. 95–632, 92 Stat. 3751 (Nov. 10, 1978) (codified at 16 U.S.C. 1532(5)(B)); *see also Conservancy of Southwest Florida v. United States Fish & Wildlife Service*, No. 2:10-cv-106-FtM-SPC, 2011 WL 1326805, *9 (M.D. Fla. April 6, 2011) (Florida panther) (plain language of statute renders designation of habitat for species listed prior to the 1978 Amendments discretionary), *aff'd*, 677 F.3d 1073 (11th Cir. 2012); *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115 n.8 (D.D.C. 1995) (grizzly bear) (same). Similarly, the 1982 amendments expressly exempted species listed prior to the 1978 amendments from the requirement that critical habitat be designated concurrently with listing. *See* P.L. No. 97–304, 96 Stat. 1411, § 2(b)(4) (Oct. 13, 1982). To reduce potential confusion, the revised regulations reflect the discretionary nature of designations for such species.

As recent litigation has highlighted, the statutory history regarding the procedures for undertaking proposals to designate critical habitat for certain species is nuanced and has proven confusing in other respects as well. For species listed before passage of the 1982 amendments to the Act (October 13, 1982), any proposed regulations issued by the Secretary to designate critical habitat are governed by the provisions in section 4 of the Act applicable to proposals to revise critical habitat designations. This is specified in an uncodified provision of the 1982 amendments. *See* Pub. L. No. 97–304, 96 Stat. 1411, 1416, 2(b)(2), 16 U.S.C. 1533 (note) (“Any regulation proposed after, or pending on, the date of the enactment of this Act to designate critical habitat for a species that was determined before such date of enactment to be endangered or threatened shall be subject to the procedures set forth in section 4 of such Act of 1973 ... for regulations proposing revisions to critical habitat instead of those for regulations proposing the designation of

critical habitat.”); *see also* *Center for Biological Diversity v. FWS*, 450 F.3d 930, 934-35 (9th Cir. 2006) (unarmored three-spine stickleback). While the Services do not propose to add regulatory text to address this narrow issue, we explain below how these provisions must be understood within the general scheme for designating critical habitat.

As a result of the above-referenced provision of the 1982 amendments, final regulations to designate critical habitat for species that were listed prior to October 13, 1982, are governed by section 4(b)(6)(A)(i) of the Act. By contrast, for species listed after October 13, 1982, final regulations are governed by section 4(b)(6)(A)(ii). Proposed rules for species listed both pre- and post-1982 are governed by section 4(b)(5). Thus, the Services have additional options at the final rule stage with regard to a proposal to designate critical habitat for those species listed prior to 1982 that they do not have when proposing to designate habitat for other species. These include an option to make a finding that the revision “should not be made” and to extend the 12-month deadline by an additional period of up to 6 months if there is substantial disagreement regarding the sufficiency or accuracy of available data. *See* 16 U.S.C. 1533(b)(6)(B)(i); *see also* *Center for Biological Diversity*, 450 F.3d at 936–37.

These provisions, however, do not affect the handling or consideration of *petitions* seeking designation of critical habitat for species listed prior to 1982. The term “petition” is not used in section 2(b)(2) of the 1982 amendments to the Act (compare to section 2(b)(1) of the same amendments, which mentions “[a]ny petition” and “any regulation”). Thus, the special procedures for finalizing proposals to designate critical habitat for species listed prior to 1982 come into play only upon a decision by the Secretary to actually propose to designate critical habitat for such species. Petitions seeking such

designations are managed just like any other petition seeking designation, which are governed by the provisions of the Administrative Procedure Act rather than section 4 of the Endangered Species Act. *See* 50 CFR 424.14(d); *Conservancy of Southwest Florida*, 2011 WL 1326805, at *9 (“It is the Secretary's proposal to designate critical habitat that triggers the statutory and regulatory obligations, not plaintiffs’ requests that the Secretary do so.”); *Fund for Animals v. Babbitt*, 903 F. Supp. at 115 (petitions to designate critical habitat are governed by the APA, not the ESA).

We are redesignating current § 424.12(g) as § 424.12(f) with minor language changes.

We are redesignating current § 424.12(h) as § 424.12(g) with minor language changes.

We are adding new § 424.12(h). This paragraph reflects the amendment to section 4(a)(3)(B)(i) of the Act in the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136). Section 424.12(h) codifies the amendments to the Act that prohibit the Services from designating as critical habitat lands or other geographic areas owned or controlled by the Department of Defense, or designated for its use, if those lands are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), and if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is being designated. In other words, if the Services conclude that an INRMP “benefits” the species, the area covered is ineligible for designation. Unlike the Secretary’s decision on exclusions under section 4(b)(2) of the Act, this resulting exemption is not subject to the discretion of the Secretary (once a benefit has been found).

Neither the Act nor the National Defense Authorization Act for Fiscal Year 2004 defines the term “benefit.” However, the conference report on the 2004 National Defense Authorization Act (Report 108–354) instructed the Secretary to “assess an INRMP’s potential contribution to species conservation, giving due regard to those habitat protection, maintenance, and improvement projects ... that address the particular conservation and protection needs of the species for which critical habitat would otherwise be proposed.” We, therefore, conclude that Congress intended “benefit” to mean “conservation benefit.” In addition, because a finding of benefit results in an exemption from critical habitat designation, and given the specific mention of “habitat protection, maintenance, and improvement” in the conference report, we infer that Congress intended that an INRMP provide a conservation benefit to the habitat (e.g., essential features) of the species, in addition to the species. Examples of actions that provide habitat-based conservation benefit to the species include: reducing fragmentation of habitat; maintaining or increasing populations in the wild; planning for catastrophic events; protecting, enhancing, or restoring habitats; buffering protected areas; and testing and implementing new habitat-based conservation strategies.

In the conference report, Congress further instructed the Secretary to “establish criteria that would be used to determine if an INRMP benefits the listed species.” The Services, therefore, describe in § 424.12(h) some factors that will help us determine whether an INRMP provides a conservation benefit: (1) The extent of area and features present; (2) the type and frequency of use of the area by the species; (3) the relevant elements of the INRMP in terms of management objectives, activities covered, and best management practices, and the certainty that the relevant elements will be implemented;

and (4) the degree to which the relevant elements of the INRMP will protect the habitat from the types of effects that would be addressed through a destruction-or-adverse-modification analysis. FWS will defer to our Guidelines for Coordination on Integrated Natural Resource Management Plans in evaluating these plans.

Under the Sikes Act, the Department of Defense is also instructed to prepare INRMPs in cooperation with FWS and each appropriate State fish and wildlife agency. The compliant or operational INRMP must reflect the mutual agreement of the involved agencies on the conservation, protection, and management of fish and wildlife resources. In other words, FWS must agree with an INRMP (reflected by signature of the plan or letter of concurrence pursuant to the Sikes Act (not to be confused with a letter of concurrence issued in relation to consultation under section 7(a)(2) of the Act)) before an INRMP can be relied upon for making an area ineligible for designation under section 4(a)(3)(B)(i). As part of this process, FWS will also conduct consultation under section 7(a)(2) of the Act, if listed species or designated critical habitat may be affected by the actions included in the INRMP. Section 7(a)(2) of the Act will continue to apply to any Federal actions affecting the species once an INRMP is compliant or operation. However, if the area is ineligible for critical habitat designation under section 4(a)(3)(B)(i), then those consultations would address only effects to the species and the likelihood of the Federal action to jeopardize the continued existence of the species.

New § 424.12(h) specifies that an INRMP must be compliant or operational to make an area ineligible for designation under section 4(a)(3)(B)(i). When the Department of Defense provides a draft INRMP for the Services' consideration during development of a critical habitat designation, the Services may evaluate it following the

guidelines set forth in our Policy on Exclusions from Critical Habitat under Section 4(b)(2) of the Act.

Existing § 424.19 results from a recent, separate rulemaking (78 FR 53058), and is not addressed in this rulemaking.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or his designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certified that the proposed rule to implement these changes to the 50 CFR Part 424 regulations would not have a significant economic impact on a substantial number of small entities (79 FR 27066, at 27075). Several commenters objected to the Services' determination that a regulatory flexibility analysis is not required for this regulation, stating the regulated community is affected by this regulation. We explained that NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that designate critical habitat, and this rule pertains to the procedures for carrying out those designations (See our response to Comment 81). No external entities, including any small businesses, small organizations, or small governments, will experience any direct economic impacts from this rule. No information received during the public comment period leads us to change our analysis.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) On the basis of information contained in the “Regulatory Flexibility Act” section above, these regulations will not “significantly or uniquely” affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that these regulations will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments will not be affected because the regulations will not place additional requirements on any city, county, or other local municipalities.

(b) These regulations will not produce a Federal mandate on State, local, or tribal governments or the private sector of \$100 million or greater in any year; that is, this rule is not a “significant regulatory action” under the Unfunded Mandates Reform Act. These regulations will impose no obligations on State, local, or tribal governments.

Takings (E.O. 12630)

In accordance with Executive Order 12630, these regulations will not have significant takings implications. These regulations will not pertain to “taking” of private property interests, nor will they directly affect private property. A takings implication assessment is not required because these regulations (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. These

regulations will substantially advance a legitimate government interest (conservation and recovery of endangered and threatened species) and will not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether these regulations will have significant Federalism effects and have determined that a Federalism assessment is not required. These regulations pertain only to determinations to designate critical habitat under section 4 of the Act, and will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

These regulations do not unduly burden the judicial system and meet the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. These regulations will clarify how the Services will make designations of critical habitat under section 4 of the Act.

Government-to-Government Relationship with Tribes

In accordance with Executive Order 13175 “Consultation and Coordination with Indian Tribal Governments,” the Department of the Interior’s manual at 512 DM 2, and the Department of Commerce (DOC) Tribal Consultation and Coordination Policy”\

(May 21, 2013), DOC Departmental Administrative Order (DAO) 218-8, and NOAA Administrative Order (NAO) 218-8 (April 2012), we have considered possible effects of this final rule on federally recognized Indian Tribes. Following an exchange of information with tribal representatives, we have determined that this rule, which modifies the general framework for designating critical habitat under the ESA, does not have tribal implications as defined in Executive Order 13175. We will continue to collaborate/coordinate with tribes on issues related to federally listed species and their habitats and work with them as appropriate as we develop particular critical habitat designations, including consideration of potential exclusion on the basis of tribal interests. *See* Joint Secretarial Order 3206 (“American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act”, June 5, 1997).

Paperwork Reduction Act

This rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have analyzed these regulations in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on

Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 1–6 and 8)), and National Oceanic and Atmospheric Administration (NOAA) Administrative Order 216–6. Our analysis includes evaluating whether this action is procedural, administrative, or legal in nature and, therefore, a categorical exclusion applies.

Following a review of the changes to the regulations at 50 CFR 424.01, 424.02, and 424.12 and our requirements under NEPA, we find that the categorical exclusion found at 43 CFR 46.210(i) applies to these regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement:

“Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.”

NOAA Administrative Order 216-6 contains a substantively identical exclusion for “policy directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature.” § 6.03c.3(i).

At the time DOI’s categorical exclusion was promulgated, there was no preamble language that would assist in interpreting what kinds of actions fall within the categorical exclusion. However, in 2008, the preamble for a language correction to this categorical exclusion gave as an example of an action that would fall within the exclusion the

issuance of guidance to applicants for transferring funds electronically to the Federal Government. In addition, examples of recent **Federal Register** notices invoking this categorical exclusion include a final rule that established the timing requirements for the submission of a Site Assessment Plan or General Activities Plan for a renewable energy project on the Outer Continental Shelf (78 FR 12676; February 26, 2013), a final rule that established limited liability for Noncoal Reclamation by Certified States and Indian Tribes (78 FR 8822; February 6, 2013), and a final rule changing the tenure of eagle permits (77 FR 22267; April 13, 2012). These regulations fell within the categorical exclusion because they did not result in any substantive change. In no way did they alter the standards for, or outcome of, any physical or regulatory Federal actions.

The changes to the critical habitat designation criteria are similar to these examples of actions that are fundamentally administrative, technical, and procedural in nature. The changes to the regulations at 50 CFR 424.01, 424.02, and 424.12 (except for paragraph (c)) clarify the procedures and criteria used for designating critical habitat, addressing in particular several key issues that have been subject to frequent litigation. In addition, the regulation revisions to 50 CFR 424.01, 424.02, and 424.12 better track the statutory language of the Act and make transparent practices the Services follow as a result of case law. The Services also make minor wording and formatting revisions throughout the three sections to reflect plain language standards. The regulation revision as a whole carries out the requirements of Executive Order 13563 because, in this rule, the Services have analyzed existing rules retrospectively “to make the agencies’ regulatory program more effective or less burdensome in achieving the regulatory

objectives.” None of the changes to the text of the regulation will result in changes to the opportunity for public involvement in any critical habitat designations.

We also considered whether any “extraordinary circumstances” apply to this situation, such that the DOI categorical exclusion would not apply. See 43 CFR 46.215 (“Categorical Exclusions: Extraordinary Circumstances”). We determined that no extraordinary circumstances apply. Although the final regulations would revise the implementing regulations for section 4 of the Act, the effects of these proposed changes would not “have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species,” as nothing in the revised regulations is intended to require that any previously listed species or completed critical habitat designation be reevaluated on this basis. Furthermore, the revised regulations do not “[e]stablish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects” (43 CFR 46.215(e)). None of the extraordinary circumstances in 43 CFR 46.215(a) through (l) apply to the revised regulations in 50 CFR 424.01, 424.02, or 424.12.

Nor would the final regulations trigger any of the extraordinary circumstances of NAO 216-6. This rule does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have

significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species or their habitats. § 5.05c.

We completed an Environmental Action Statement for the Categorical Exclusion for the revised regulations in 50 CFR 424.01, 424.02, and 424.12.

Energy Supply, Distribution or Use (E.O. 13211)

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. These regulations are not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

References Cited

A complete list of all references cited in this document is available on the Internet at <http://www.regulations.gov> or upon request from the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Authority

We are taking this action under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.).

List of Subjects in 50 CFR Part 424

Administrative practice and procedure, Endangered and threatened species.

Regulation Promulgation

Accordingly, we are amending part 424, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

PART 424—[AMENDED]

1. The authority citation for part 424 continues to read as follows:

AUTHORITY: 16 U.S.C. 1531 *et seq.*

2. Revise § 424.01 to read as follows:

§ 424.01 Scope and purpose.

(a) Part 424 provides regulations for revising the Lists of Endangered and Threatened Wildlife and Plants and designating or revising the critical habitats of listed species. Part 424 provides criteria for determining whether species are endangered or threatened species and for designating critical habitats. Part 424 also establishes

procedures for receiving and considering petitions to revise the lists and for conducting periodic reviews of listed species.

(b) The purpose of the regulations in part 424 is to interpret and implement those portions of the Act that pertain to the listing of species as threatened or endangered species and the designation of critical habitat.

3. Revise § 424.02 to read as follows:

§ 424.02 Definitions.

The definitions contained in the Act and parts 17, 222, and 402 of this title apply to this part, unless specifically modified by one of the following definitions. Definitions contained in part 17 of this title apply only to species under the jurisdiction of the U.S. Fish and Wildlife Service. Definitions contained in part 222 of this title apply only to species under the jurisdiction of the National Marine Fisheries Service.

Candidate. Any species being considered by the Secretary for listing as an endangered or threatened species, but not yet the subject of a proposed rule.

Conserve, conserving, and conservation. To use and the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary, i.e., the species is recovered in accordance with section 402.02. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and

maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Geographical area occupied by the species. An area that may generally be delineated around species' occurrences, as determined by the Secretary (i.e., range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

List or lists. The Lists of Endangered and Threatened Wildlife and Plants found at 50 CFR 17.11(h) or 17.12(h).

Physical or biological features. The features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Public hearing. An informal hearing to provide the public with the opportunity to give comments and to permit an exchange of information and opinion on a proposed rule.

Special management considerations or protection. Methods or procedures useful in protecting the physical or biological features essential to the conservation of listed species.

Species. Includes any species or subspecies of fish, wildlife, or plant, and any distinct population segment of any vertebrate species that interbreeds when mature. Excluded is any species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of the Act would present an overwhelming and overriding risk to man.

Wildlife or fish and wildlife. Any member of the animal kingdom, including without limitation, any vertebrate, mollusk, crustacean, arthropod, or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

4. In § 424.12, revise paragraphs (a), (b), and (d) through (h) to read as follows:

§ 424.12 Criteria for designating critical habitat.

(a) To the maximum extent prudent and determinable, we will propose and finalize critical habitat designations concurrent with issuing proposed and final listing rules, respectively. If designation of critical habitat is not prudent or if critical habitat is not determinable, the Secretary will state the reasons for not designating critical habitat in the publication of proposed and final rules listing a species. The Secretary will make a final designation of critical habitat on the basis of the best scientific data available, after taking into consideration the probable economic, national security, and other relevant impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is not prudent when any of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species; or

(ii) Such designation of critical habitat would not be beneficial to the species. In determining whether a designation would not be beneficial, the factors the Services may consider include but are not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of "critical habitat."

(2) Designation of critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking; or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of "critical habitat."

(b) Where designation of critical habitat is prudent and determinable, the Secretary will identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat.

(1) The Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas within the geographical area occupied by the species for consideration as critical habitat. The Secretary will:

(i) Identify the geographical area occupied by the species at the time of listing.

(ii) Identify physical and biological features essential to the conservation of the species at an appropriate level of specificity using the best available scientific data. This analysis will vary between species and may include consideration of the appropriate quality, quantity, and spatial and temporal arrangements of such features in the context of the life history, status, and conservation needs of the species.

(iii) Determine the specific areas within the geographical area occupied by the species that contain the physical or biological features essential to the conservation of the species.

(iv) Determine which of these features may require special management considerations or protection.

(2) The Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species based on the best available scientific data.

* * * * *

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, the Secretary may designate an inclusive area as critical habitat.

(e) The Secretary may designate critical habitat for those species listed as threatened or endangered but for which no critical habitat has been previously designated. For species listed prior to November 10, 1978, the designation of critical habitat is at the discretion of the Secretary.

(f) The Secretary may revise existing designations of critical habitat according to procedures in this section as new data become available.

(g) The Secretary will not designate critical habitat within foreign countries or in other areas outside of the jurisdiction of the United States.

(h) The Secretary will not designate as critical habitat land or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to a compliant or operational integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a) if the Secretary determines in writing that such plan provides a conservation benefit to the species for which critical habitat is being designated. In determining whether such a benefit is provided, the Secretary will consider:

- (1) The extent of the area and features present;
- (2) The type and frequency of use of the area by the species;
- (3) The relevant elements of the INRMP in terms of management objectives, activities covered, and best management practices, and the certainty that the relevant elements will be implemented; and
- (4) The degree to which the relevant elements of the INRMP will protect the habitat from the types of effects that would be addressed through a destruction-or-adverse-modification analysis.

January 29, 2016

Signed:

Michael J. Bean

Michael J. Bean

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

~~Listing Endangered and Threatened Species and Designating Critical Habitat;~~

~~Implementing Changes to the Regulations for Designating Critical Habitat~~

January 29, 2016

Signed:



Samuel D. Rauch, III,
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

~~Listing Endangered and Threatened Species and Designating Critical Habitat;
Implementing Changes to the Regulations for Designating Critical Habitat~~

Billing Codes 4333–15; 3510–22–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Dockets FWS–R9–ES–2011–0104 and 120206102-5603-03; 4500030114]

RIN 1018–AX87; 0648–BB82

Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act

AGENCIES: U.S. Fish and Wildlife Service (FWS), Interior; National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice of final policy.

SUMMARY: We, the U.S Fish and Wildlife Service and the National Marine Fisheries Service, (jointly, the “Services”) announce our final policy on exclusions from critical habitat under the

Endangered Species Act. This non-binding policy provides the Services' position on how we consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. This policy complements our implementing regulations regarding impact analyses of critical habitat designations and is intended to clarify expectations regarding critical habitat and provide for a more predictable and transparent critical-habitat-exclusion process.

DATES: This policy is effective [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may review the reference materials and public input used in the creation of this policy at <http://www.regulations.gov> at Docket No. FWS-R9-ES-2011-0104. Some of these materials are also available for public inspection at U.S. Fish and Wildlife Service, Division of Conservation and Classification, MS: ES, 5275 Leesburg Pike, Falls Church, VA 22041-3803 during normal business hours.

FOR FURTHER INFORMATION CONTACT: Douglas Krofta, U.S. Fish and Wildlife Service, Division of Conservation and Classification, MS: ES, 5275 Leesburg Pike, Falls Church, VA 22041-3803; telephone 703/358-2171; facsimile 703/358-1735; or Marta Nammack, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301/427-8469; facsimile 301/713-0376. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service

(FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Today, we publish in the **Federal Register** three related documents that are final agency actions. This document is one of the three, of which two are final rules and one is a final policy:

- A final rule that amends the regulations governing section 7 consultation under the Endangered Species Act to revise the definition of “destruction or adverse modification” of critical habitat. That regulatory definition had been invalidated by several courts for being inconsistent with the Act. This final rule amends title 50 of the Code of Federal Regulations (CFR) at part 402. The Regulation Identifier Numbers (RIN) are 1018–AX88 and 0648–BB82, and the final rule may be found on <http://www.regulations.gov> at Docket No. FWS–R9–ES–2011–0072.
- A final rule that amends the regulations governing the designation of critical habitat under section 4 of the Act. A number of factors, including litigation and the Services’ experience over the years in interpreting and applying the statutory definition of “critical habitat,” highlighted the need to clarify or revise the regulations. This final rule amends 50 CFR part 424. It is published under RINs 1018–AX86 and 0648–BB79 and may be found on <http://www.regulations.gov> at Docket No. FWS–HQ–ES–2012–0096.
- A final policy pertaining to exclusions from critical habitat and how we may consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. This final policy complements the final rule

amending 50 CFR 424.19 and provides for a predictable and transparent exclusion process. The policy is published under RINs 1018–AX87 and 0648–BB82 and is set forth below in this document. The policy may be found on <http://www.regulations.gov> at Docket No. FWS–R9–ES–2011–0104.

Background

The National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) are charged with implementing the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), the goal of which is to provide a means to conserve the ecosystems upon which listed species depend and to provide a program for listed species conservation.

Critical habitat is one tool in the Act that Congress established to achieve species conservation.

In section 3(5)(A) of the Act Congress defined “critical habitat” as:

- (i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
- (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Specifying the geographic location of critical habitat helps facilitate implementation of section 7(a)(1) by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the Act. In addition to serving as an

educational tool, the designation of critical habitat also provides a significant regulatory protection—the requirement that Federal agencies consult with the Services under section 7(a)(2) to insure their actions are not likely to destroy or adversely modify critical habitat.

Section 4 of the Act requires the Services to designate critical habitat, and sets out standards and processes for determining critical habitat. Congress authorized the Secretaries to “exclude any area from critical habitat if [s]he determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [s]he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned” (section 4(b)(2)).

Over the years, legal challenges have been brought to the Services’ process for considering exclusions. Several court decisions have addressed the Services’ implementation of section 4(b)(2). In 2008, the Solicitor of the Department of the Interior issued a legal opinion on implementation of section 4(b)(2) (<http://www.doi.gov/solicitor/opinions.html>). That opinion is based on the text of the Act and principles of statutory interpretation and relevant case law. The opinion explained the legal considerations that guide the Secretary’s exclusion authority, and discussed and elaborated on the application of these considerations to the circumstances commonly faced by the Services (e.g., habitat conservation plans, Tribal lands).

To provide greater predictability and transparency regarding how the Services generally consider exclusions under section 4(b)(2), the Services announce this final policy regarding several issues that frequently arise in the context of exclusions. This policy on implementation of specific aspects of section 4(b)(2) does not cover the entire range of factors that may be considered as the basis for an exclusion in any given designation, nor does it serve as a comprehensive interpretation of all the provisions of section 4(b)(2).

This final policy sets forth the Services' position regarding how we consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. The Services intend to apply this policy when considering exclusions from critical habitat. That being said, under the terms of the policy, the Services retain a great deal of discretion in making decisions with respect to exclusions from critical habitat. This policy does not mandate particular outcomes in future decisions on critical habitat designations.

Changes to the Proposed Policy Elements

Below are a summary of changes to the proposed policy elements as a result of public comment and review. The final policy elements can be found at the end of this policy.

1. Added language to policy element 2 to make clear that the list presented in this policy is not a list of requirements for non-permitted plans, but rather factors the Services will use to evaluate non-permitted plans and partnerships. This list is not exclusive; all items may not apply to every plan.
2. In policy element 2(c), added text to the criterion in the non-permitted plans policy element to clarify that required determinations may be a factor considered in a discretionary 4(b)(2) exclusion analysis where such determinations are "necessary and appropriate."
3. Removed the phrase, "not just providing guidelines," from paragraph 3(c).
4. Made several other minor edits to increase clarity and readability of the policy elements.

Implementation of Section 4(b)(2) of the Act

On August 28, 2013 (78 FR 53058), the Services published a final rule revising 50 CFR 424.19. In that rule the Services elaborated on the process and standards for implementing section 4(b)(2) of the Act. This final policy is meant to complement those revisions to 50 CFR 424.19, and provides further clarification as to how the Services will implement section 4(b)(2) when designating critical habitat.

Section 4(b)(2) of the Act provides that:

The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if [s]he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [s]he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

In 1982, Congress added this provision to the Act, both to require the Services to consider the relevant impacts of designating critical habitat and to provide a means for the Services to reduce potentially negative impacts of designation by excluding, in appropriate

circumstances, particular areas from a designation. The first sentence of section 4(b)(2) sets out a mandatory requirement that the Services consider the economic impact, impact on national security, and any other relevant impacts prior to designating an area as part of a critical habitat designation. The Services always consider such impacts, as required under this sentence, for each and every designation of critical habitat. (Although the term “homeland security” was not in common usage in 1982, the Services conclude that Congress intended that “national security” includes what we now refer to as “homeland security.”)

The second sentence of section 4(b)(2) outlines a separate, discretionary process by which the Secretaries may elect to determine whether to exclude an area from the designation, by performing an exclusion analysis. The Services use their consideration of impacts under the first sentence of section 4(b)(2), their consideration of whether to engage in the discretionary exclusion analysis under the second sentence of section 4(b)(2), and any exclusion analysis that the Services undertake, as the primary basis for satisfying the provisions of Executive Orders 12866 and 13563. E.O. 12866 (incorporated by E.O. 13563) requires agencies to assess the costs and benefits of a rule, and, to the extent permitted by law, to propose or adopt the rule only upon a reasoned determination that the benefits of the intended regulation justify the costs.

Conducting an exclusion analysis under section 4(b)(2) involves balancing or weighing the benefits of excluding a particular area from a designation of critical habitat against the benefits of including that area in the designation. If the benefits of exclusion outweigh the benefits of inclusion, the Secretaries may exclude the particular area, unless they determine that the exclusion will result in the extinction of the species concerned. The discretionary 4(b)(2) exclusion analysis is fully consistent with the E.O. requirements in that the analysis permits excluding an area where the benefits of exclusion outweigh the benefits of inclusion, and would

not lead to exclusion of an area when the benefits of exclusion do not outweigh the benefits of inclusion.

This policy sets forth specific categories of information that we often consider when we enter into the discretionary 4(b)(2) exclusion analysis and exercise the Secretaries' discretion to exclude areas from critical habitat. We do not intend to cover in these examples all the categories of information that may be relevant, or to limit the Secretaries' discretion to consider and assign weight to any relevant benefits as appropriate.

Moreover, our implementing regulations at 50 CFR 424.19 further clarify the exclusion process for critical habitat and address statutory changes and case law. The regulations at 50 CFR 424.19, as well as the statute itself, state that the Secretaries have the discretion to exclude any particular area from the critical habitat upon a determination that the benefits of such exclusion outweigh the benefits of specifying the particular area as part of the critical habitat. Furthermore, the Secretaries may consider any relevant benefits. The weight and consideration given to those benefits is within the discretion of the Secretaries. The regulations at 50 CFR 424.19 provide the framework for how the Services intend to implement section 4(b)(2) of the Act. This policy further details the discretion available to the Services (acting for the Secretaries), and provides detailed examples of how the Services may consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process when we undertake a discretionary 4(b)(2) exclusion analysis.

*General Framework for Considering an Exclusion and Conducting a Discretionary 4(b)(2)
Exclusion Analysis*

When the Services determine that critical habitat is prudent and determinable for species listed as endangered or threatened species under the Act, they must follow the statutory and regulatory provisions of the Act to designate critical habitat. The Act's language makes clear that biological considerations drive the initial step of identifying critical habitat. First, the Act's definition of "critical habitat" requires the Secretaries to identify areas based on the conservation needs of the species. Second, section 4(b)(2) expressly requires designations to be made based on the best scientific data available. (It is important to note that, once the Secretaries identify specific areas that meet the definition of "critical habitat," the Secretaries do not have the discretion to decline to recognize those areas as potential critical habitat. Only areas subject to an integrated natural resources management plan (INRMP) that meets the requirements of section 4(a)(3)(B)(i) are categorically ineligible for designation.)

Having followed the biologically driven first step of identifying "critical habitat" for a species, the Secretaries turn to the remaining procedures set forth in section 4(b)(2), which allow for consideration of whether those areas ultimately should be designated as critical habitat. Thus, pursuant to the first sentence of section 4(b)(2), the Secretaries then undertake the mandatory consideration of impacts on the economy and national security, as well as any other impact that the Secretaries determine is relevant.

The Act provides a mechanism that allows the Secretaries to exclude particular areas only upon a determination that the benefits of exclusion outweigh those of inclusion, so long as the exclusion will not result in the extinction of the species concerned. The Services call this the discretionary 4(b)(2) exclusion analysis. Neither the Act nor the implementing regulations at 50 CFR 424.19 require the Secretaries to conduct a discretionary 4(b)(2) exclusion analysis (see,

e.g., *Cape Hatteras Access Preservation Alliance v. DOI*, 731 F. Supp. 2d 15, 29-30 (D.D.C. 2010)). Rather, the Secretaries have discretion as to whether to conduct that analysis. If a Secretary decides not to consider exclusion of any particular area, no additional analysis is required. However, if the Secretary contemplates exclusion of a particular area, an initial screening may be conducted to evaluate potential exclusions. The Secretary may undertake a preliminary evaluation of any plans, partnerships, economic considerations, national-security considerations, or other relevant impacts identified after considering the impacts required by the first sentence of section 4(b)(2). Following the preliminary evaluation, the Secretary may choose to enter into the discretionary 4(b)(2) exclusion analysis for any particular area. If the Secretary does so, the Secretary has broad discretion as to what factors to consider as benefits of inclusion and benefits of exclusion, and what weight to assign to each factor—nothing in the Act, its implementing regulations, or this policy limits this discretion.

When conducting a discretionary 4(b)(2) exclusion analysis, one of the factors that the Secretaries may consider is the effect of existing conservation plans or programs. Those plans and programs can reduce the benefits of including particular areas in a designation of critical habitat. To state this another way, because there are already conservation actions occurring on the ground as a result of the plan or program, the regulatory benefit of overlaying a designation of critical habitat may be reduced, because the designation may be redundant, or may provide little more conservation benefit compared to what is already being provided through the conservation plan or program. As a result, the existence of these conservation plans or programs reduces the benefits of including an area in critical habitat. As a matter of logic, however, the conservation benefits of an existing conservation plan or program generally cannot be considered benefits of excluding the area it covers from designation as critical habitat. This is because the

conservation plan or program neither results from the exclusion being contemplated, nor is its continuation dependent on the exclusion being contemplated. The conservation plan or program is materially unaffected regardless of inclusion or exclusion from critical habitat.

In addition, the Services wish to encourage and foster conservation partnerships, which can lead to future conservation plans that benefit listed species. This is particularly important because partnerships can lead to conservation actions that provide benefits, with respect to private lands, that often cannot be achieved through designation of critical habitat and section 7 consultations. Because conservation partnerships are voluntary, the Services have concluded that excluding areas covered by existing plans and programs can encourage land managers to partner with the Services in the future, by removing any real or perceived disincentives for engaging in conservation activities. Those future partnerships do not necessarily reduce the benefits of including an area in critical habitat now; they may, however, provide a benefit by encouraging future conservation action. That benefit is a benefit of excluding an area from the designation. Thus, an existing plan or program can reduce the benefits of inclusion of an area covered by the plan or program, and at the same time the Secretaries' choice to exclude the area may encourage future conservation partnerships. Moreover, because the fostering and maintenance of partnerships can greatly further the conservation goals of the Act, we generally give great weight to the benefits of excluding areas where we have demonstrated partnerships.

In a discretionary 4(b)(2) exclusion analysis, the Services compare benefits of inclusion with benefits of exclusion. Some examples of benefits of including a particular area in critical habitat include, but are not limited to: (1) The educational benefits of identifying an area as critical habitat (e.g., general increase of awareness of listed species and their designated critical habitat); and (2) the regulatory benefit of designating an area as critical habitat as realized

through an adverse modification analysis in a section 7 consultation. As discussed above, these benefits of inclusion may be reduced by the conservation provisions of a plan or program, in that the educational benefit may have already been realized through development of the plan, and the on-the-ground conservation actions may already provide some or all of the benefit that could be reasonably expected as the outcome of a section 7 consultation. The weights assigned to the benefits of inclusion in any particular case are determined by the Secretaries. Some examples of benefits of excluding a particular area from critical habitat include: (1) where there is an existing conservation plan or program, the encouragement of additional conservation partnerships in the future; and (2) the avoidance of probable negative incremental impacts from designating a particular area as critical habitat, including economic impacts and impacts to national security and public safety.

The next step in the discretionary 4(b)(2) exclusion analysis is for the Secretaries to determine if the benefits of exclusion outweigh the benefits of inclusion for a particular area. If so, they may exclude that area, unless they determine that the exclusion will result in the extinction of the species concerned. We note that exclusions primarily based on conservation plans will likely maintain the overall level of protection for the species in question, because the plans will have reduced or eliminated the benefit of designating that area, as discussed above. In contrast, exclusions primarily based on economic or national security considerations may result in less overall protection for the species (i.e., forgoing significant benefits of inclusion). However, regardless of conservation outcome as outlined above, the Secretaries may still exclude such areas as long as they conclude that the benefits of exclusion outweigh the benefits of inclusion (and the exclusion itself would not result in extinction of the species).

Policy Elements

a. The Services' Discretion.

The Act affords a great degree of discretion to the Services in implementing section 4(b)(2). This discretion is applicable to a number of aspects of section 4(b)(2) including whether to enter into the discretionary 4(b)(2) exclusion analysis and the weights assigned to any particular factor used in the analysis. Most significant is that the decision to exclude is always discretionary, as the Act states that the Secretaries “may” exclude any areas. Under no circumstances is exclusion required under the second sentence of section 4(b)(2).

This policy explains how the Services generally exercise their discretion to exclude an area when the benefits of exclusion outweigh the benefits of inclusion. In articulating this general practice, the Services do not intend to limit in any manner the discretion afforded to the Secretaries by the statute.

b. Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General.

We sometimes exclude specific areas from critical habitat designations based in part on the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships. A conservation plan or agreement describes actions that are designed to provide for the conservation needs of a species and its habitat, and may include actions to reduce or mitigate negative effects on the species caused by activities on or adjacent to the area covered by the plan. Conservation plans or agreements can be developed by private entities with no Service involvement, or in partnership with the Services. In the case of a habitat conservation

plan (HCP), safe harbor agreement (SHA), or a candidate conservation agreement with assurances (CCAA), a plan or agreement is developed in partnership with the Services for the purposes of attaining a permit under section 10 of the Act. See paragraph c, below, for a discussion of HCPs, SHAs, and CCAAs.

We evaluate a variety of factors to determine how the benefits of any exclusion and the benefits of inclusion are affected by the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships when we undertake a discretionary 4(b)(2) exclusion analysis. A non-exhaustive list of factors that we will consider for non-permitted plans or agreements is shown below. These factors are not required elements of plans or agreements, and all items may not apply to every plan or agreement.

- (i) The degree to which the record of the plan supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership;
- (ii) The extent of public participation in the development of the conservation plan;
- (iii) The degree to which there has been agency review and required determinations (e.g., State regulatory requirements), as necessary and appropriate;
- (iv) Whether National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) compliance was required;
- (v) The demonstrated implementation and success of the chosen mechanism;
- (vi) The degree to which the plan or agreement provides for the conservation of the essential physical or biological features for the species;
- (vii) Whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan or agreement will be implemented; and

- (viii) Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.

The Services will consider whether a plan or agreement has previously been subjected to public comment, agency review, and NEPA compliance processes because that may indicate the degree of critical analysis the plan or agreement has already received. For example, if a particular plan was developed by a county-level government that had been required to comply with a State-based environmental-quality regulation, the Services would take that into consideration when evaluating the plan. The factors outlined above influence the Services' determination of the appropriate weight that should be given to a particular conservation plan or agreement.

c. Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act.

HCPs for incidental take permits under section 10(a)(1)(B) of the Act provide for partnerships with non-Federal entities to minimize and mitigate impacts to listed species and their habitat. In some cases, HCP permittees agree to do more for the conservation of the species and their habitats on private lands than designation of critical habitat would provide alone. We place great value on the partnerships that are developed during the preparation and implementation of HCPs.

CCAAs and SHAs are voluntary agreements designed to conserve candidate and listed species, respectively, on non-Federal lands. In exchange for actions that contribute to the conservation of species on non-Federal lands, participating property owners are covered by an "enhancement of survival" permit under section 10(a)(1)(A) of the Act, which authorizes

incidental take of the covered species that may result from implementation of conservation actions, specific land uses, and, in the case of SHAs, the option to return to a baseline condition under the agreements. The Services also provide enrollees assurances that we will not impose further land-, water-, or resource-use restrictions, or require additional commitments of land, water, or finances, beyond those agreed to in the agreements.

When we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider areas covered by a permitted CCAA/SHA/HCP, and we anticipate consistently excluding such areas from a designation of critical habitat if incidental take caused by the activities in those areas is covered by the permit under section 10 of the Act and the CCAA/SHA/HCP meets all of the following conditions:

1. The permittee is properly implementing the CCAA/SHA/HCP, and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is, and has been, fully implementing the commitments and provisions in the CCAA/SHA/HCP, Implementing Agreement, and permit.
2. The species for which critical habitat is being designated is a covered species in the CCAA/SHA/HCP, or very similar in its habitat requirements to a covered species. The recognition that the Services extend to such an agreement depends on the degree to which the conservation measures undertaken in the CCAA/SHA/HCP would also protect the habitat features of the similar species.
3. The CCAA/SHA/HCP specifically addresses the habitat of the species for which critical habitat is being designated and meets the conservation needs of the species in the planning area.

We will undertake a case-by-case analysis to determine whether these conditions are met and, as with other conservation plans, whether the benefits of exclusion outweigh the benefits of inclusion.

The benefits of excluding lands with CCAAs, SHAs, or properly implemented HCPs that have been permitted under section 10 of the Act include relieving landowners, communities, and counties of any additional regulatory burdens that might be imposed as a result of the critical habitat designation. A related benefit of exclusion is the unhindered, continued ability to maintain existing partnerships, and the opportunity to seek new partnerships with potential plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners. Together, these entities can implement conservation actions that the Services would be unable to accomplish without private landowners. These partnerships can lead to additional CCAAs, SHAs, and HCPs. This is particularly important because HCPs often cover a wide range of species, including listed plant species (for which there is no general take prohibition under section 9 of the Act), and species that are not State or federally listed (which do not receive the Act's protections). Neither of these categories of species are likely to be protected from development or other impacts in the absence of HCPs.

As is the case with conservation plans generally, the protections that a CCAA, SHA, or HCP provide to habitat can reduce the benefits of including the covered area in the critical habitat designation. However, those protections may not eliminate the benefits of critical habitat designation. For example, because the Services generally approve HCPs on the basis of their efficacy at minimizing and mitigating negative impacts to listed species and their habitat, these plans generally offset those benefits of inclusion. Nonetheless, HCPs often allow for development of some of the covered area, and the associated permit provides authorization of

incidental take caused by that development (although a properly designed HCP should steer development toward the least biologically important habitat). Thus, designation of the areas specified for development that meet the definition of “critical habitat” may still provide a conservation benefit to the species. In addition, if activities not covered by the HCP are affecting or may affect an area that is identified as critical habitat, then the benefits of inclusion of that specific area may be relatively high, because additional conservation benefits may be realized by the designation of critical habitat in that area. In any case, the Services will weigh the benefits of inclusion against the benefits of exclusion (usually the fostering of partnerships that may result in future conservation actions).

We generally will not exclude from a designation of critical habitat any areas likely to be covered by CCAAs, SHAs, and HCPs that are still under development when we undertake a discretionary 4(b)(2) exclusion analysis. If a CCAA, SHA, or HCP is close to being approved, we will evaluate these draft plans under the framework of general plans and partnerships (subsection b, above). In other words, we will consider factors, such as partnerships that have been developed during the preparation of draft CCAAs, SHAs, and HCPs, and broad public benefits, such as encouraging the continuation of current and development of future conservation efforts with non-Federal partners, as possible benefits of exclusion. However, we will generally give little weight to promises of future conservation actions in draft CCAAs, SHAs, and HCPs; therefore, we will generally find that such promises will do little to reduce the benefits of inclusion in the discretionary 4(b)(2) exclusion analysis, even if they may directly benefit the species for which a critical habitat designation is proposed.

d. Tribal Lands.

There are several Executive Orders, Secretarial Orders, and policies that relate to working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Tribal lands, emphasize the importance of developing partnerships with Tribal governments, and direct the Services to consult with Tribes on a government-to-government basis.

A joint Secretarial Order that applies to both FWS and NMFS, Secretarial Order 3206, *American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206), is the most comprehensive of the various guidance documents related to Tribal relationships and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, S.O. 3206 explicitly recognizes the right of Tribes to participate fully in the listing process, including designation of critical habitat. The Order also states: “Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.” In light of this instruction, when we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider exclusions of Tribal lands under section 4(b)(2) of the Act prior to finalizing a designation of critical habitat, and will give great weight to Tribal concerns in analyzing the benefits of exclusion.

However, S.O. 3206 does not preclude us from designating Tribal lands or waters as critical habitat, nor does it state that Tribal lands or waters cannot meet the Act’s definition of “critical habitat.” We are directed by the Act to identify areas that meet the definition of “critical habitat” (i.e., areas occupied at the time of listing that contain the essential physical or biological

features that may require special management or protection and unoccupied areas that are essential to the conservation of a species), without regard to landownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Secretaries' statutory authority.

e. Impacts on National Security and Homeland Security.

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)), as revised in 2003, provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan [INRMP] prepared under section 101 of the Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation." In other words, as articulated in the final revised regulations at 50 CFR 424.12(h), if the Services conclude that an INRMP "provides a benefit" to the species, the area covered is ineligible for designation and thus cannot be designated as critical habitat.

Section 4(a)(3)(B)(i) of the Act, however, may not cover all DoD lands or areas that pose potential national-security concerns (e.g., a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of "critical habitat." Nevertheless, when designating critical habitat under section 4(b)(2), the Secretaries must consider impacts on national security, including homeland security, on lands or areas not covered by section 4(a)(3)(B)(i). Accordingly, we will always consider for exclusion from the

designation areas for which DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns.

We cannot, however, automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, it must provide a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation. If the agency provides a reasonably specific justification, we will defer to the expert judgment of DoD, DHS, another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion. In that circumstance, in conducting a discretionary 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

f. Federal Lands.

We recognize that we have obligations to consider the impacts of designation of critical

habitat on Federal lands under the first sentence of section 4(b)(2) and under E.O. 12866.

However, as mentioned above, the Services have broad discretion under the second sentence of 4(b)(2) on how to weigh those impacts. In particular, “[t]he consideration and weight given to any particular impact is completely within the Secretary’s discretion.” (H.R. Rep. No. 95–1625, at 17 (1978)). In considering how to exercise this broad discretion, we are mindful that Federal land managers have unique obligations under the Act. First, Congress declared its policy that “all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” (section 2(c)(1)). Second, all Federal agencies have responsibilities under section 7 of the Act to carry out programs for the conservation of listed species and to ensure their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

We also note that, while the benefits of excluding non-Federal lands include development of new conservation partnerships, those benefits do not generally arise with respect to Federal lands, because of the independent obligations of Federal agencies under section 7 of the Act. Conversely, the benefits of including Federal lands in a designation are greater than non-Federal lands because there is a Federal nexus for projects on Federal lands. Thus, if a project for which there is discretionary Federal involvement or control is likely to adversely affect the critical habitat, a formal section 7 consultation would occur and the Services would consider whether the project would result in the destruction or adverse modification of the critical habitat.

Under the Act, the only direct consequence of critical habitat designation is to require Federal agencies to ensure, through section 7 consultation, that any action they fund, authorize, or carry out does not destroy or adversely modify designated critical habitat. The costs that this

requirement may impose on Federal agencies can be divided into two types: (1) the additional administrative or transactional costs associated with the consultation process with a Federal agency, and (2) the costs to Federal agencies and other affected parties, including applicants for Federal authorizations (e.g., permits, licenses, leases), of any project modifications necessary to avoid destruction or adverse modification of critical habitat. Consistent with the unique obligations that Congress imposed for Federal agencies in conserving endangered and threatened species, we generally will not consider avoidance of the administrative or transactional costs associated with the section 7 consultation process to be a “benefit” of excluding a particular area from a critical habitat designation in any discretionary 4(b)(2) exclusion analysis. We will, however, consider the extent to which such consultation would produce an outcome that has economic or other impacts, such as by requiring project modifications and additional conservation measures by the Federal agency or other affected parties.

Federal lands should be prioritized as sources of support in the recovery of listed species. To the extent possible, we will focus designation of critical habitat on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands. We do greatly value the partnership of other Federal agencies in the conservation of listed and non-listed species. However, for the reasons listed above, we will focus our exclusions on non-Federal lands. We are most likely to determine that the benefits of excluding Federal lands outweigh the benefits of including those lands when national-security or homeland-security concerns are present.

g. Economic Impacts.

The first sentence of section 4(b)(2) of the Act requires the Services to consider the economic impacts (as well as the impacts on national security and any other relevant impacts) of

designating critical habitat. In addition, economic impacts may, for some particular areas, play an important role in the discretionary 4(b)(2) exclusion analysis under the second sentence of section 4(b)(2). In both contexts, the Services will consider the probable incremental economic impacts of the designation. When the Services undertake a discretionary 4(b)(2) exclusion analysis with respect to a particular area, they will weigh the economic benefits of exclusion (and any other benefits of exclusion) against any benefits of inclusion (primarily the conservation value of designating the area). The conservation value may be influenced by the level of effort needed to manage degraded habitat to the point where it could support the listed species. The Services will use their discretion in determining how to weigh probable incremental economic impacts against conservation value. The nature of the probable incremental economic impacts and not necessarily a particular threshold level triggers considerations of exclusions based on probable incremental economic impacts. For example, if an economic analysis indicates high probable incremental impacts of designating a particular critical habitat unit of low conservation value (relative to the remainder of the designation), the Services may consider exclusion of that particular unit.

Summary of Comments and Recommendations

On May 12, 2014, we published a document in the **Federal Register** (79 FR 27052) that requested written comments and information from the public on the draft policy regarding implementing section 4(b)(2) of the Act. In that document, we announced that the comment period would be open for 60 days, ending July 11, 2014. We received numerous requests to extend the comment period, and we subsequently published a document on June 26, 2014 (79 FR

36330), extending the comment period to October 9, 2014. Comments we received are grouped into general categories specifically relating to the draft policy.

Comment (1): Many commenters, including federally elected officials, requested an extension of the public comment period announced in the draft policy. Additionally, we received requests to reopen the comment period that ended on October 9, 2014.

Our Response: On June 26, 2014 (79 FR 36330), we extended the public comment period on the draft policy for an additional 90 days to accommodate this request and to allow for additional review and public comment. The comment period for the draft policy was, therefore, open for 150 days, which provided adequate time for all interested parties to submit comments and information. Additionally, the Services held numerous outreach initiatives that included briefings and webinars for elected officials, States, potentially affected Federal agencies, and interest groups, both environmental- and industry-focused.

Secretarial Discretion

Comment (2): We received many comments regarding the Services' delegated discretion from the Secretaries. Commenters expressed concern that the Services' delegated discretion is too broad, the assigning of weight to benefits is subjective, and the proposed policy would greatly extend the Services' discretionary authority and allow for subjective disregard of voluntary State and private conservation efforts.

Our Response: This policy does not expand or reduce Secretarial authority. The policy reflects only the discretion expressly provided for in the Act. The word "shall" is used to denote

mandatory actions or outcomes, and “may” is used to indicate where there is discretion in particular matters. In the Act, the word “may,” as it prefaces the phrase “exclude a particular area,” thus clearly provides the Secretaries a choice, the ability to decide whether areas should be excluded based on weighing benefits of inclusion against the benefits of exclusion. The Secretaries may choose to exclude particular areas if those benefits of exclusion outweigh benefits of inclusion, unless the exclusion will result in the extinction of the species concerned. Commenters appear to be questioning the Secretary’s ability to choose whether to enter into the discretionary weighing of benefits. Congress expressly provided the Secretaries discretion to decide whether to enter into the exclusion analysis described in the second sentence of section 4(b)(2). By contrast, the Secretaries do not have discretion when it comes to the requirement to consider the economic impact, impacts to national security, and any other relevant impact of specifying an area as critical habitat, as described in the first sentence of section 4(b)(2).

Finally, this policy generally reflects the practices followed by the Services regarding their implementation of section 4(b)(2), and provides greater transparency by explaining to the public how the Services generally exercise the discretion granted by the Act.

Comment (3): Some commenters suggested that the Services need to clarify that the Secretaries have discretion in whether to conduct an exclusion analysis. They stated that, while the draft policy does identify the discretionary nature of exclusions under 4(b)(2), language in other areas of the policy, such as “we will always consider” and “generally exclude,” may cause confusion, and appear contradictory. Furthermore, some commenters stated that discussion of the discretionary 4(b)(2) exclusion analysis should clearly state that such analysis occurs only after the Secretary has identified an area she “may” consider for exclusion, based on

consideration of the economic impact, the impact on national security, and any other relevant impact (see M-Opinion at 2. Step 2, p. 17).

Our Response: We agree with the commenter, and have made edits in the final policy to reflect and clarify what are requirements under the Act and where discretion is provided, in particular with the discretionary 4(b)(2) exclusion analysis.

Comment (4): Commenters noted that the Services are required to consider all reasonable requests for exclusion, which is in contrast to the Services' position that they cannot be required to grant an exclusion request, and state that "in no circumstances is exclusion required." The commenters stated that the Services' narrow view of section 4(b)(2) cannot be reconciled with the Act, or the history surrounding the 1978 amendments, and there is nothing in the statute that confers broad discretion. The two sentences of 4(b)(2) require the Services to "consider" economic impacts, and then to consider excluding a particular area from the designation of critical habitat. The commenters suggested that these are not separate obligations, and that it is illogical for the Services to suggest that Congress intended to require the Services to identify the economic impacts without intending for the Services to apply any consideration of those impacts.

Our Response: We disagree with the commenter. Section 4(b)(2) of the Act sets forth a mandatory consideration of impacts and a discretionary consideration of possible exclusions. The commenter is mistaken that the Act requires any particular "action" that must be taken following the consideration of impacts. The text of the Act is clear in the second sentence of section 4(b)(2):

The Secretary may exclude any area from critical habitat if [s]he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the

critical habitat, unless [s]he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Recent court decisions have resoundingly upheld the discretionary nature of the Secretaries' consideration of whether to exclude areas from critical habitat. *See Bldg. Indus. Ass'n v. U.S. Dept. of Commerce*, 792 F.3d.1027 (9th Cir. 2015), *aff'd* 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012) (unreported); *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d. 977 (9th Cir. 2015); *Cape Hatteras Access Pres. Alliance v. DOI*, 731 F. Supp. 2d 15, 28–30 (D.D.C. 2010). The operative word is “may.” There is no requirement to exclude, or even to enter into a discretionary 4(b)(2) exclusion analysis for, any particular area identified as critical habitat. The Services do consider economic impacts, and apply the consideration of those probable incremental economic impacts in considering whether to enter into the discretionary 4(b)(2) exclusion analysis. Based on the results of the economic analysis, the Services may elect not to enter into the discretionary 4(b)(2) exclusion analysis based on economic impact alone. If they engage in a discretionary exclusion analysis, the Services may consider information from different sources (e.g., the economic analysis and conservation plan) in one section 4(b)(2) exclusion analysis.

Comment (5): Numerous commenters interpreted the draft policy as a significant change in how the Services will consider exclusions under 4(b)(2).

Our Response: The Services are not changing our practice of considering or conducting discretionary 4(b)(2) exclusion analyses. The 2008 Department of the Interior Solicitor's Section 4(b)(2) memorandum (M-37016, “The Secretary's Authority to Exclude Areas from a

Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act” (Oct. 3, 2008)) (DOI 2008) and the regulations at 50 CFR 424.19 provide general guidance on how to implement section 4(b)(2) of the Act, and form the basis for this policy. This policy generally reflects the practices followed by the Services, and provides greater transparency by explaining to the public how the Services generally exercise the discretion granted by the Act.

Framework for Discretionary 4(b)(2) Exclusion Analysis

Comment (6): A commenter noted that, rather than considering partnership opportunities as a benefit of exclusion, the Services expect that benefits of an existing conservation plan will continue regardless of critical habitat designation and, therefore, do not consider an existing plan when weighing the benefits of exclusion. Furthermore, the Services will consider these benefits to reduce the benefits of inclusion. The commenter expressed concern that this position could serve as a disincentive for voluntary conservation. Furthermore, the commenter suggested that under the new policy, the Services will have to review for potential exclusion each plan on a case-by-case basis, giving the Services broader discretion than previously held.

Our Response: Because we received many similar comments, we have added a section, *General Framework for Considering an Exclusion and Conducting a Discretionary 4(b)(2) Exclusion Analysis*, to the preamble of this document to clarify the way we consider and conduct exclusions. Furthermore, this section explains the way in which we consider conservation plans and partnerships when conducting a discretionary 4(b)(2) exclusion analysis. In brief, the commenters appear to misunderstand how we account for the benefits of conservation plans. The accounting that we use (what counts as a benefit of exclusion, and what serves to reduce

benefits of inclusion) is the only logical way of parsing the effects of conservation plans consistent with the statute. But in no way does this accounting discount the benefits of conservation plans—it just puts those benefits in the proper context. Therefore, we disagree with the commenters that our accounting will in any way act as a disincentive for voluntary conservation. In fact, one of the primary purposes of this policy is to explain the important role that conservation plans play in our implementation of section 4(b)(2), and thus, in effect, to explain the existing incentive for land managers to create those plans.

The Services have reviewed and will continue to review each plan for potential exclusion on a case-by-case basis; we are continuing our existing practice, and not broadening our discretion. Adopting a policy that would exclude areas without an analysis and weighing of the benefits of inclusion and exclusion on a case-by-case basis, as the commenters appear to suggest, would not be consistent with the requirements of the Act or our implementing regulations at 50 CFR 424.19.

Comment (7): One commenter suggested that the policy should be revised to give greater detail on the processes the Services will use to review and exclude areas covered by existing conservation plans. When determining whether the benefits of exclusion outweigh the benefits of inclusion, the commenter noted that the Services will evaluate a variety of factors; however, no metrics were provided. For example, it is uncertain if each factor must be considered or if only three or four are sufficient. The commenter posed questions such as: will the Services give all factors equal weight or will some be deemed more important, and what evidence must be provided to demonstrate that the thresholds have been met? While the factors provide general direction, the commenter stated the Services provide no indication of how the evaluations will be

conducted or what the thresholds might be. Finally, the commenter suggested it is unclear how the Services plan on evaluating whether the agreements are being properly implemented and how the Services will evaluate whether the permittee is expected to continue to properly implement the agreement.

Our Response: The Services cannot prescribe which factors should be used when developing a conservation plan that does not have Federal involvement. The list provided in the draft policy and in this final policy is not exhaustive; rather, it is intended to illustrate the types of factors that the Services will use when evaluating such plans.

Conservation plans that lead to the issuance of a permit under section 10 of the Act (including HCPs) go through a rigorous analysis under the Act to qualify for that permit. As discussed above, we will often exclude areas covered by such conservation plans. On the other hand, non-permitted conservation plans may not go through such analysis, and therefore must be more thoroughly analyzed before we will consider excluding areas covered by these plans.

The list of factors for non-permitted plans is not exclusive, not all factors may apply to every instance of evaluating a plan or partnership, and the listed factors are not requirements of plans or partnerships to be considered for exclusion. Criteria for non-permitted plans differ from criteria for permitted plans because the latter have already undergone rigorous analysis for the issuance of the associated permit and may have been measured or evaluated by additional criteria. For example, NEPA analysis has already been conducted before a permitted plan is finalized and a permit issued.

Comment (8): Several commenters suggested that the methodology for exclusion should be defined, and the draft policy grants the agencies much more leeway to include or exclude

lands from critical habitat designation, by requiring that each area considered for exclusion be reviewed on a case-by-case basis. Commenters also stated that, although the policy states that the benefits of designation of critical habitat will be weighed against the costs of such designation in a cost/benefit analysis, there is no clearly defined methodology included in the draft policy. Commenters stated that, when exercising their discretion, the Services should explain fully the basis, including the weighing of benefits, for any determination that exclusion is not warranted for any of the areas covered by the policy.

Our Response: As discussed in our response to comment (2) above, this policy does not increase the discretion granted to the Secretaries by the Act. Moreover, each area considered for exclusion is unique, and evaluations are highly fact-specific; thus it is not possible to give a simple, formulaic methodology that will be used in all landscapes and situations. Further, it is important that the Secretaries retain discretion in assigning appropriate weight to benefits of inclusion and exclusion. Whenever the Services exclude areas under section 4(b)(2), they will explain the factors considered and the weighing of benefits. If the Services do not exclude an area that has been requested to be excluded through public comment, the Services will respond to this request. However, although the Services will explain their rationale for not excluding a particular area, that decision is committed to agency discretion. (*Cape Hatteras Access Preservation Alliance v. DOI*, 731 F. Supp. 2d 15, 29–30 (D.D.C. 2010)).

Blanket or Presumptive Exclusions

Comment (9): Many commenters suggested there is a lack of certainty that areas covered by permitted conservation plans will be excluded. Commenters stated that permitted

conservation plans, including HCPs, SHAs, and CCAAs, provide a much greater conservation benefit to private land areas than other programs implemented under the Act. Many commenters asked that the final policy be modified to categorically exclude from critical habitat lands covered by permitted plans, provided that the plan is being properly implemented and the species is a covered species under the plan. Commenters noted that the conservation benefits from such agreements and the investment of effort and collaboration between the private sector and the Services should be acknowledged, and areas covered by conservation agreements developed and approved by the Services should expressly be excluded from designation of critical habitat. Commenters expressed concern that the need for a factual balancing test each time critical habitat is designated for a covered species poses major uncertainties for permittees.

Our Response: The Services agree with the goal of providing greater certainty through this policy. However, each plan is different, covers different areas with different objectives, and will likely have differences in implementation and effectiveness, differences in duration, and so forth. Therefore, the Services must consider each plan on a case-by-case basis.

As stated above, the Services do greatly value the commitments of private landowners and conservation partners to conserve species and their habitats. Even so, the Services cannot presumptively exclude particular areas from a designation of critical habitat. Should the Services enter into a discretionary 4(b)(2) exclusion analysis, the Act requires the Services to compare the benefits of including a particular area in critical habitat with the benefits of excluding the particular area. The Secretary may exclude an area if the benefits of exclusion outweigh those of inclusion, as long as the exclusion will not result in extinction of the species. Where they have decided to exclude an area, the Services must provide a reasonable consideration of factors on each side of the balance. The Services' draft policy and this final policy articulate clearly that

the Services will give great weight and consideration to partnerships resulting from the development of HCPs, SHAs, and CCAAs. Additionally, the Services will give great weight to the conservation measures delivered on the ground by the plans mentioned above. The weight of the conservation measures will be applied to reduce the benefits of inclusion of that particular area in critical habitat, and in many cases the benefits of exclusion will outweigh the benefits of inclusion.

However, a permitted plan and a critical habitat designation may further different conservation goals. A permitted plan for a covered species addresses certain specific activities in a discrete area. It is designed to mitigate or minimize impacts from specific projects. By contrast, we designate critical habitat to conserve a species throughout its range (and sometimes beyond) in light of the varying threats facing the species. Thus, in a discretionary 4(b)(2) exclusion analysis, the Services must undertake a thorough balancing analysis for those areas that may be excluded, and cannot presume that the fact pattern is the same for each specific instance of a general category of plans.

Comment (10): Despite acknowledging the utility of non-permitted private and non-Federal conservation plans and partnerships, several commenters expressed the concern that the exclusion of these areas is not automatically guaranteed. Instead, the commenters noted that the Services will “sometimes exclude specific areas” from a critical habitat designation based on the existence of these plans or partnerships. In order to be successful, commenters stated private/non-Federal plans must be supported by the Services and automatically excluded from critical habitat designations. If not, future conservation plans may be at risk because applicants will feel uncertainty regarding the utility of their efforts. Commenters requested the Services to

codify this change and ensure that land protected through voluntary conservation efforts will not be subjected to critical habitat overlays.

Our Response: Please see our response to the previous comment. Just as the Services cannot automatically guarantee exclusion of permitted conservation plans, we cannot presumptively exclude, or automatically exclude, private and non-Federal plans. When undertaking the discretionary 4(b)(2) exclusion analysis, the Services are obligated by section 4(b)(2) to weigh the benefits of inclusion and exclusion. The Services conduct this evaluation on a case-by-case, fact-specific basis. In this context, automatically excluding certain classes of lands or certain classes of agreements would be arbitrary.

However, as noted above, the Services do highly value private and non-Federal conservation plans and partnerships, and our objective is to encourage participation in voluntary conservation planning and collaborative partnerships. When entering into the discretionary 4(b)(2) exclusion analysis, the Services will consider fully the value and benefits of such plans and partnerships. The Services acknowledge that such programs and partnerships can implement conservation actions that the Services would be unable to accomplish without private and non-Federal landowners and partners.

Comment (11): Certain States requested the addition of a policy element to categorically or presumptively exclude all lands managed by State wildlife agencies. They stated that the Services should consider partnerships with State wildlife agencies similarly to the way they consider partnerships with Native American Tribes, and exclude lands managed by the State as they do Tribal lands. Whether a State conservation plan has been vetted through the public process should not have any relevance to the exclusion of such lands from critical habitat.

Our Response: As noted above, the Services must follow the direction of the Act and identify those lands meeting the definition of “critical habitat,” regardless of landownership. It is only after the identification of lands that meet the definition of “critical habitat” that we can consider other relevant factors. It appears that the commenter is requesting presumptive exclusion of specific State lands without a case-by-case analysis. As discussed above, the Act does not give the Secretaries the authority to exclude areas from critical habitat without first undertaking a discretionary 4(b)(2) exclusion analysis. As we consider areas for potential exclusion, as discussed throughout this policy, we give great weight and consideration to conservation partnerships, including those partnerships with States and Tribes. The Services note that S.O. 3206 has no applicability to State governments or State lands. Even in the context in which it applies, S.O. 3206 does not provide a blanket exclusion or automatic exemption of Tribal lands.

Comment (12): To further provide incentives for landowners or local and State governments to enter into conservation plans, agreements, or partnerships, a commenter stated the Services should, if they conduct a discretionary exclusion analysis, always exclude such areas from critical habitat designation if the benefits of exclusion outweigh the benefits of inclusion. The commenter stated that exclusion may incentivize parties to participate in future conservation plans or partnerships, especially the prelisting conservation measures encouraged by the Fish and Wildlife Service's recent draft policy regarding voluntary prelisting conservation actions.

Our Response: The Services agree that recognition of partnerships through exclusion from critical habitat may serve to remove any real or perceived disincentive that a designation of

critical habitat may produce, and encourage parties to further engage in future conservation planning efforts. Should the Services elect to conduct a discretionary 4(b)(2) exclusion analysis, and if the benefits of exclusion outweigh the benefits of inclusion, in almost all situations we expect to exclude that particular area. Although the Services find it necessary to retain some discretion for the Secretaries because we cannot anticipate all fact patterns that may occur in all situations when considering exclusions from critical habitat, it is the general practice of the Services, consistent with E.O. 12866, to exercise this discretion to exclude an area when the benefits of exclusion outweigh the benefits of inclusion. However, the Secretaries may not exclude a particular area if the exclusion will result in the extinction of the species concerned. Please see the section *General Framework for Considering an Exclusion and Conducting a Discretionary 4(b)(2) Exclusion Analysis*, above, for more information regarding the exclusion process.

Plans Permitted Under Section 10 of the Act

Comment (13): One commenter suggested that the draft policy should not contain a categorical rejection of an agreement with “guidelines” for habitat management. Even if the agreement provides guidelines relating to the species’ habitat, rather than specifically addressing habitat, the commenter noted that if those guidelines were followed they may provide a greater benefit to the species than would a critical habitat designation. Finally the commenter noted that each plan should be analyzed individually for its benefit to the species; this would support the Services’ stated policy of encouraging the development of section 10 agreements.

Our Response: We agree with the commenter regarding plans with guidelines that, if followed, may provide a greater benefit to a species than would a designation of critical habitat. However, should the Services choose to enter into the discretionary 4(b)(2) exclusion analysis for a plan that only has guidelines, the Services will evaluate the benefits of inclusion and exclusion based on the specific facts of the plan in question. We have removed the language regarding guidelines from the final policy.

Comment (14): One commenter stated that the Services should not designate or exclude mere portions of HCPs. An HCP, taken as a whole, is designed to meet the conservation needs of the species and is specifically developed to meet those needs while still allowing certain development impacts to occur. The commenter suggested the policy would allow the Services to exclude just beneficial parts of an approved HCP, and designate those areas that are less desirable but still an integral component of the HCP.

Our Response: If the HCP has been approved and permitted, and if the Services undertake a discretionary 4(b)(2) exclusion analysis and find that the benefits of exclusion outweigh the benefits of inclusion, we intend to exclude the entire area covered by the HCP from the final designation of critical habitat for the species.

Comment (15): One commenter stated that the Services should consider excluding areas covered by HCPs and SHAs that are under development, but not yet completed or fully implemented. The draft policy proposes to give very little weight to section 10 agreements that are in process but not formalized. The commenter expressed a concern that not giving weight to developing voluntary conservation plans could greatly reduce incentives for private landowners

and other entities to continue these efforts. The Services should analyze in-progress agreements individually. The agreements will vary greatly in scope, coverage, and the level of protections granted to the species and the extent of progress towards a formal agreement. If a comprehensive agreement is close to being formalized at the time of critical habitat designation, the commenter suggested there is no reason for the Services to designate that land as critical habitat and ignore the effort of the parties involved to benefit the species and its habitat. To ignore those efforts would discourage other landowners from pursuing similar plans or partnerships in the future, undermining future cooperation for the benefit of the species. Finally, the commenter suggested that the policy should be revised to give greater detail on the processes the Services will use to efficiently review and exclude areas covered by conservation plans being developed.

Our Response: Should the Services elect to undergo a discretionary 4(b)(2) exclusion analysis of an area in which a voluntary conservation plan is being developed, we will consider the facts specific to the situation. If a draft HCP has undergone NEPA and section 7 analysis, the Services could evaluate that plan under the provisions of this policy that are applicable to conservation plans and partnerships for which no section 10 permit has been issued. The track record of the partnership and the time taken to develop the draft HCP would be considerations in any discretionary 4(b)(2) exclusion analysis. The Services would not ignore ongoing efforts to develop plans. Some of the factors we consider are the degree of certainty that the plan will be implemented, that it will continue into the future, and that it may provide equal or greater protection of habitat than would a critical habitat designation. Therefore, the Services would expect to evaluate draft permitted plans on a case-by-case basis, and may evaluate them under the non-permitted-plans-and-partnerships sections of this policy.

Comment (16): A commenter asked the Services to clarify that not every conservation plan will undergo a weighing and balancing process. Paragraph 3 of the draft policy states: “When we undertake a discretionary exclusion analysis, we will always consider areas covered by an approved CCAA/SHA/HCP, and generally exclude such areas from a designation of critical habitat if three conditions are met” The commenter questioned whether the discretionary analysis is triggered by potential “severe” impacts (as described in step 2 of the M Opinion at p. 17: “if [she] deems the impacts of the designation severe enough, [she] will proceed with an exclusion analysis under section 4(b)(2)”) on a particular area covered by a CCAA/SHA/HCP, or whether the presence of such conservation plan(s) triggers the discretionary analysis regardless of impacts. If the former, the Services should clarify that only the potentially affected conservation plan(s) will be subjected to the discretionary exclusion analysis. If the latter, the commenter expressed a concern that the result of such a policy is to significantly limit Secretarial discretion.

Our Response: The Services are not limiting Secretarial discretion through this policy. The presence of a conservation plan or partnership does not mandate a discretionary 4(b)(2) exclusion analysis. If the Secretary decides to enter into the discretionary 4(b)(2) exclusion analysis, the Services may consider, among other things, whether a plan is permitted, or whether we receive information during a public comment period that we should consider a certain plan for exclusion. However, it is possible that the Secretaries will not conduct a discretionary 4(b)(2) exclusion analysis for each and every conservation plan. As noted in the final rule revising 50 CFR 424.19, the Secretaries are particularly likely to conduct this discretionary

analysis if the consideration of impacts mandated under the first sentence suggests that the designation will have significant incremental impacts.

Tribal Comments

Comment (17): Numerous Tribes have asked to have their lands presumptively or categorically excluded from critical habitat designation. The commenters stated that, absent evidence that exclusion would lead to the extinction of the species, Tribal lands should always be excluded. While the Tribes appreciate the Services giving great weight and consideration to excluding Tribal lands, Tribes would prefer their lands to be categorically excluded.

Our Response: While the Services recognize their responsibilities and commitments under Secretarial Order 3206 and in light of Tribal sovereignty, the statute is clear on the process of designating critical habitat, and does not allow for presumptive exclusion of any areas, regardless of ownership, from critical habitat without conducting a discretionary 4(b)(2) exclusion analysis. If we determine that Tribal lands meet the definition of “critical habitat,” the statute requires we identify those lands as meeting that definition. However, as discussed in the draft and this final policy, great weight and consideration will be given to Tribal partnerships and conservation plans if the Services enter into the discretionary 4(b)(2) exclusion analysis.

Comment (18): Many commenters expressed that the designation of critical habitat on Tribal lands would have an unfortunate and substantial negative impact on the working relationships the Services and Tribes have established. The Services should state that, when they undertake a discretionary exclusion analysis, they will always consider exclusions of Tribal lands

and not designate such areas, unless it is determined such areas are essential to conserve a listed species.

Our Response: The Services recognize our trust responsibilities with Tribes, and value our collaborative conservation partnerships. Secretarial Order 3206, which provides guidance to the Departments in exercising their statutory authorities – but does not modify those authorities – states:

Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

Therefore, the Services generally will not designate critical habitat on Tribal lands if the conservation needs of the listed species can be achieved on other lands. However, if it is determined such areas are essential to conserve the listed species, then, as discussed in the previous comment response, the Services will give great weight and consideration to Tribal partnerships and conservation plans if the Services enter into the discretionary 4(b)(2) exclusion analysis.

Comment (19): Several Tribes expressed a concern that the new policy will result in greater economic and social burdens on Tribes. Tribes bear a disproportionate burden through the consultation process under section 7 of the Act, as compared to State and local governments and private citizens, because so many basic Tribal functions are contingent on actions authorized, funded, or carried out by Federal agencies. Therefore, the commenters stated that, where Tribal lands are designated as critical habitat, the proposed regulations and policies will

require an onerous, time-consuming, bureaucratic process that infringes on Tribal sovereignty and treaty rights and frustrates the ability of the Tribe to provide basic government services and achieve wildlife-conservation and economic-development goals.

Our Response: While the Services recognize that a critical habitat designation may have real or perceived direct and indirect impacts, the Services are committed to assisting Tribes in conserving listed species and their habitats on Tribal lands, where appropriate. Where collaborative conservation partnerships and programs have been developed with Tribes, many of these real or perceived impacts have been ameliorated or relieved. The revised regulations and new policy are intended to provide clarity, transparency, and certainty regarding the development and designation of critical habitat, and provide for a more predictable and transparent critical-habitat-exclusion process. All three initiatives work together to provide greater clarity to the public and Tribes as to how the Services develop and implement critical habitat designations.

Comment (20): One commenter stated that, as written, the policy fails to acknowledge the sovereignty of Tribes and Tribal self-governance by noting only that “Tribal concerns” will be considered in the discretionary exclusion analysis. These proposed regulations and policies represent a missed opportunity to effectuate the letter and spirit of Secretarial Orders 3206 and 3335, and to ameliorate the potentially harsh consequences on Tribes of the proposed regulatory revisions for designating critical habitat. Of even more concern, the Service completely ignores the fundamental disagreement concerning the applicability of the Endangered Species Act to Tribes.

Our Response: Secretarial Order 3206 explicitly recognizes the right of Tribes to participate fully in the listing process, including designation of critical habitat. The Order states:

Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

However, S.O. 3206 does not limit the Services' authorities under the ESA or preclude the Services from designating Tribal lands or waters as critical habitat, nor does it suggest that Tribal lands or waters cannot meet the Act's definition of "critical habitat." We are directed by the Act to identify areas that meet the definition of "critical habitat" (i.e., occupied lands that contain the essential physical or biological features that may require special management considerations or protection and unoccupied areas that are essential to the conservation of a species) without regard to landownership. While S.O. 3206 provides important guidance, it does not relieve or supersede the Secretaries' statutory obligation to identify as critical habitat those specific areas meeting the definition of "critical habitat" and to designate such areas unless otherwise exempted by statute or excluded following the discretionary 4(b)(2) exclusion analysis.

Further, following the language and intent of S.O. 3206, when we undertake a discretionary 4(b)(2) exclusion analysis we will always consider exclusions of Tribal lands prior to finalizing a designation of critical habitat, and will give great weight to the collaborative conservation partnerships the Services have with the Tribes, as well as Tribal conservation programs and plans that address listed species and their habitats. The effects of critical habitat designation on Tribal sovereignty and the Services' working relationship with Tribes are relevant impacts that the Services will generally consider in the context of any exclusion analysis under Section 4(b)(2). See, e.g., Center for Biological Diversity v. Norton, 240 F. Supp. 2d 1090, 1105 (D. Ariz. 2003).

State Comments

Comment (21): One commenter asked the Services to use the same standards for evaluating State conservation plans as those used for evaluating federally permitted plans for possible exclusions. The commenter noted that in the draft policy the Services have outlined different conditions for exclusion for HCPs, SHAs, and CCAAs versus all other conservation plans (including State plans). The former must only meet three conditions, while the latter are evaluated based on eight factors. Justification is not provided for why two different sets of criteria are being used. For example, HCP/SHA/CCAA plans need only be “properly implemented” while other conservation plans must show not only implementation but also “success of the chosen mechanism.” No explanation for this difference is provided. Furthermore, the commenter noted that all plans should be held to the same threshold for exclusion consideration. States spend enormous amounts of time to craft species-conservation plans. Finally, the commenter stated that plans are developed and implemented based on extensive scientific expertise housed in State wildlife agencies and they are crafted to meet State and Federal laws, rules, and regulations applicable to the protection of wildlife.

Our Response: The Services recognize that considerable time and expertise go into creating State management plans. Any requests for exclusions by States will be considered, whether based on a State management plan or for a State wildlife area. The Services need to evaluate any exclusion request on a case-by-case, fact-specific basis. The Services recognize that not all State plans are the same, and not all plans are designed to meet applicable Federal laws, rules, and regulations. The eight factors presented in this final policy regarding non-

permitted plans are factors the Services will consider when conducting a discretionary 4(b)(2) exclusion analysis evaluating a State conservation plan or wildlife management area for exclusion. We will not hold State or other non-Federal conservation plans to higher standards than permitted plans; the list of eight factors simply indicates the types of factors we will evaluate in any conservation plan. It should be noted that HCPs and SHAs have already been subjected to rigorous analyses of numerous criteria through the permitting process that are not expressly listed in the policy.

Comment (22): A commenter suggested that the Services add the following language to the policy regarding State lands:

We recognize Congress placed high value in working with State partners in the conservation of threatened and endangered species and we will give great weight to the recommendations from our State partners when evaluating critical habitat on State lands. Many States have land holdings that cross a broad spectrum of uses that can range from lands primarily managed for conservation purposes while other lands are owned to provide maximum economic return as in the case of some State school lands. The Service, in weighing the benefits of inclusion versus exclusion of State lands, will conduct a discretionary analysis if the State indicates a wish to be excluded from a critical habitat designation and provides a detailed assessment on the merits of their requested exclusion. The Service is not under obligation to exclude those State lands but will use the State's assessment as we weigh the expected gain in conservation value for inclusion of a tract of State land in a final critical habitat designation.

Our Response: As stated above, the Services decline to add a specific policy element suggesting that we would give great weight to recommendations of our State partners when evaluating critical habitat on State lands. The Services agree with the commenter's premise that conservation of endangered and threatened species cannot be done without cooperation of State partners. We also agree that we generally will consider exclusions of State lands if requested by States; however, we are under no obligation to exclude such lands, even where requested.

Comments Regarding Federal Lands

Comment (23): One commenter stated that the Services should not "focus" designation of critical habitat on Federal lands, nor assume that the benefits of critical habitat designations on Federal lands "are typically greater" than the benefits of excluding these areas.

Our Response: When designating critical habitat, the Services follow the Act and implementing regulations to develop a designation based solely on the best scientific data available, and that identifies physical or biological features essential to the conservation of a species or areas that are essential for the conservation of a species. This initial identification of eligible areas that meet the definition of "critical habitat" is conducted without regard to landownership or the identity of land managers. Before finalizing a designation of critical habitat, the Services must consider economic impacts, the impact on national security, and any other relevant impact of designating critical habitat. It is following this consideration of potential impacts that the Secretary may then exclude particular areas from critical habitat, but only if the exclusion will not result in the extinction of the species.

The Services look to the Congressional intent of the Act—in particular, section 2(c) states that all Federal agencies shall seek to conserve listed species and their habitats. Additionally, section 7(a)(2) of the Act requires Federal agencies that fund, authorize, or carry out projects to ensure their actions are not likely to destroy or adversely modify critical habitat. The commenter does not explain why the Services should not focus, to the extent practicable and allowed by the Act, on designation of critical habitat on Federal lands. Also, the commenter does not provide an explanation to support its view that the benefits of including Federal lands in a designation of critical habitat are not typically greater than including other areas. In fact, because Federal agencies are required to ensure that their actions are not likely to destroy or adversely modify critical habitat, the benefits of including Federal lands are typically greater than the benefits of including other areas.

Comment (24): Another commenter asked the Services to consider excluding Federal lands that are subject to special management by land-management agencies. Congress has mandated that Federal lands, such as lands managed by the Bureau of Land Management (BLM) and the U.S. Forest Service, be available for multiple uses. The commenter stated the Services' designation of critical habitat primarily on Federal lands upsets the balance struck in land-management decisions made by the agencies charged with administering Federal lands and, moreover, interferes with the directives established by Congress.

Our Response: Complying with the Act does not interfere with other Federal agency mandates. The Act is one of many Federal mandates with which all Federal agencies must comply, and Federal agencies must use available discretion to take into account the needs of listed species when implementing their other duties. The Services are also required to comply

with the Act as they manage their lands, monuments, trust resources, and sanctuaries for multiple purposes. It has been the experience of the Services that listing or designating critical habitat for species does not drastically alter existing management schemes of other Federal agencies. In those instances where conflicts arise, the Services have successfully worked with the affected Federal agency to reduce conflicts with its mission. The Services are committed to continuing the collaborative relationships with other Federal agencies to further conservation of species and their habitats.

Comment (25): One commenter stated that a reasonable exclusion policy should allow the Services to recognize and consider exclusions for all types of conservation projects, whether they occur on Federal or non-Federal lands. The commenter understands the Services' intent to reduce regulatory burdens on private lands. However, the commenter opposes a policy that would disqualify exclusions on Federal lands, while prioritizing them for recovery. The commenter strongly stated that exclusions should be based on the criteria outlined in section 4(b)(2) of the Act, whether the land is Federal or non-Federal. Section 4(b)(2) of the Act provides the Secretary the discretion to "exclude any area from critical habitat if [s]he determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat," but does not delineate whether landownership should play a factor in the decision to exclude lands from designation.

Our Response: To the extent that the commenter is suggesting that discretionary 4(b)(2) exclusion analyses are done on a case-by-case basis and are highly fact-specific, we agree. This policy does not preclude exclusions of Federal lands; in fact, the Services have excluded particular Federal lands in the recent past. However, the Services maintain their policy position

that Federal lands will typically have greater benefits of inclusion compared to the benefits of exclusion. This position is consistent with the purposes of the Act as outlined in section 2.

Section 2(c)(1) states:

It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.

Additionally, section 7(a)(1) restates this responsibility and specifically requires all Federal agencies to consult with the Services to carry out programs for conservation of endangered and threatened species. Because the section 7 consultation requirements apply to projects carried out on Federal lands where there is discretionary Federal involvement or control, designation of critical habitat on Federal lands is more likely to benefit species than designation of critical habitat on private lands without a Federal nexus.

Comment (26): A commenter suggested that the Services should create an incentive for Federal land managers. The Services could consider a similar approach to Federal land exclusions that are provided for Department of Defense installations. Applying this same standard to all Federal lands, the commenter stated, would create a stronger incentive for more agencies to live up to the requirements of section 7(a)(1) of the Act.

Our Response: Congress intended for Federal agencies to participate in the conservation of endangered and threatened species. As discussed above, section 2(c)(1) of the Act clearly states this responsibility. Additionally, section 7(a)(1) restates this responsibility and specifically requires all Federal agencies to consult with the Services to carry out programs for conservation of endangered and threatened species. Section 7(a)(2) of the Act requires Federal agencies to

consult with the Services to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.”

Exemption of Department of Defense lands from critical habitat is mandated under section 4(a)(3)(B)(i) of the Act, and is thus entirely different from discretionary exclusions of particular lands from a designation of critical habitat under section 4(b)(2). Exemption of an area covered under an INRMP under the Sikes Act is based on the statutory condition that the Secretary has determined the plan provides a benefit to a species, whereas an exclusion of a particular area is based on the discretionary 4(b)(2) weighing of the benefits of inclusion and exclusion.

Comments on Economics

Comment (27): A commenter asked the Services to provide details of how costs and benefits are evaluated. The draft policy does not clearly define how benefits and costs will be determined, giving the Services a great deal of discretion. The commenter noted that the draft policy does not adequately explain how the consideration of economic impacts will be applied during the exclusion process. The phrase “nature of those impacts” in the draft policy fails to provide a description that will give adequate notice of what will actually be considered.

Our Response: The policy is not intended to present a detailed treatment of economic impact analysis methodology. The **Summary of Comments and Recommendations** section of the Service’s final rule regarding revisions to the regulations for impact analyses of critical

habitat, which was published on August 28, 2013 (78 FR 53058), contains a discussion of cost and benefit analysis of critical habitat designations.

To aid in the consideration of probable incremental economic impacts under section 4(b)(2) of the Act, the Services conduct an economic analysis of the designation of critical habitat, which satisfies the mandatory consideration of economic impacts. Should the Secretaries consider excluding a particular area from critical habitat, the economic analysis is one tool the Secretaries may use to inform their decision whether to exclude the particular area.

The commenter points out that the phrase “nature of those impacts” is not defined. The Services intentionally did not define this phrase, because it has been the experience of the Services that economic impacts of critical habitat designations vary widely, making it infeasible to quantify the level of impacts that would trigger further consideration in all cases.

Comment (28): Because the Services use an incremental approach to estimating economic impacts, one commenter suggested that the economic impacts of critical habitat are vastly underestimated. The commenter suggested the Services should conduct an economic analysis that evaluates the cumulative and co-extensive costs of critical habitat. Focusing on incremental economic impacts does not provide an accurate picture, as it discounts the full financial implications of a listing for landowners, businesses, and communities. The commenter expressed the opinion that the incremental approach effectively shifts the economic costs of critical habitat designations to the listing process under the Act where the Service is prohibited from considering costs. Ultimately, because this approach will result in fewer costs being attributed to critical habitat designation, it will greatly reduce the usefulness of the 4(b)(2) process.

Our Response: We disagree. Our final rule amending 50 CFR 424.19, published August 28, 2013 (78 FR 53058), codified the use of the incremental method for conducting impact analyses, including economic analyses, for critical habitat designations. That final rule contains responses to public comments that clearly lay out the Services' rationale for using the incremental method. Please refer to that rule for more information. Evaluating incremental impacts that result from a regulation being promulgated, rather than considering coextensive impacts that may be ascribed to various previous regulations, is further supported by Executive Order 12866, as applied by OMB Circular A-4.

Comment (29): Congress expressly required the Secretaries to consider economic impacts when they designate critical habitat (16 U.S.C. 1533(b)(2)). A commenter stated the Services have interpreted this requirement to limit their use of the economic analysis to the exclusion process. The commenter further noted that the draft policy restricts discussions of the economic impacts from critical habitat designation to determinations of whether an area will be excluded from a critical habitat designation. Economic concerns are arguably the most important consideration for those being regulated. The commenter expressed the opinion that the designation of critical habitat has economic impacts on States, counties, local governments, and landowners. These impacts include increased regulatory burdens that delay projects. The commenter stated it is important that the Services recognize the economic impacts of critical habitat designation and consider those impacts throughout the designation process, as required by Congress under the Endangered Species Act. The commenter asked that the draft policy be amended to emphasize use of economic impacts analyses in each stage of the designation process, not just exclusion of an area from a critical habitat designation.

Our Response: We agree that the mandatory consideration of economics is an important step in the designation of critical habitat. However, we disagree that economic impact analyses should be used at each step of the designation process. The process of developing a designation is based on the best available scientific information, and consists of a determination of what is needed for species conservation. Congress expressly prohibited the Secretaries from using anything other than the best available scientific information in identifying areas that meet the definition of “critical habitat.” However, Congress expressly required the Secretaries to consider economic impacts, national-security impacts, and other relevant impacts before finalizing the critical habitat designation.

The Services prepare an economic analysis of each proposed designation of critical habitat and may use that information in discretionary 4(b)(2) exclusion analyses. Our final rule that amended our implementing regulations at 50 CFR 424.19, which was published on August 28, 2013 (78 FR 53058), contains more information regarding impact analyses, including economics. This final policy is focused on the discretionary process of excluding areas under section 4(b)(2).

Comment (30): A commenter stated that the economic impact of critical habitat designations on the exercise of rights to Federal lands is significant and should not be discounted. In the preamble to the draft policy, the Services state that they “generally will not consider avoiding the administrative or transactional costs associated with the section 7 consultation process to be a ‘benefit’ of excluding a particular area from a critical habitat designation in any discretionary exclusion analysis.” The commenter suggested this statement ignores that administrative and transactional costs of critical habitat designations can be

significant, particularly when critical habitat will cover a large area. The commenter stated that Federal agencies are not the only entities that must absorb the costs of section 7 consultation. Administrative and transactional costs are also borne by non-Federal parties, such as applicants for permits or licenses. The commenter further noted that, if the exclusion analysis is limited to non-Federal lands, where section 7 consultation is often not triggered, the economic benefits of exclusion will rarely be considered. For proponents of large projects on Federal lands, these economic benefits of exclusion can be significant.

Our Response: We agree with the commenter that the Services should consider the indirect effects resulting from a designation of critical habitat. In fact, the Services are required to evaluate the direct and indirect costs of the designation of critical habitat under the provisions of Executive Order 12866, and we do so through the economic analyses of the designation of critical habitat. However, as noted previously, we do not consider avoidance of transactional costs associated with section 7 consultation to be a benefit of exclusion. Rather, those costs represent the inherent consequence of Congress' decision to require Federal agencies to avoid destruction or adverse modification. Please refer to the **Summary of Comments and Recommendations** section of the final rule amending 50 CFR 424.19 (78 FR 53058, August 28, 2013), particularly our response to Comment 44, for more information regarding direct and indirect costs.

Comment (31): One commenter suggested that the Services should also consider potential economic benefits of inclusion. Economic benefits of designating critical habitat include a potentially faster rate of recovery for the species, which could result in less long-term costs for the agency and partners.

Our Response: The Act requires a mandatory consideration of the economic impact of designating a specific area as critical habitat. The Services interpret this statement to be inclusive of benefits and costs that result from the designation of critical habitat. This interpretation is further supported by Executive Order 12866 as clarified in OMB Circular A-4. The Services do consider non-consumptive use benefits, such as hiking, increased tourism, or appreciation of protected open or green areas, in a qualitative manner where credible data are available. Further, in rare circumstances, when independent and credible research can be conducted on the benefits for a particular species, that information is used. However, for most species, credible studies and data related to potential economic benefits of designating their habitat as critical habitat are not available or quantifiable.

Comment (32): One commenter expressed the opinion that listing decisions under the Act have real economic impacts for State and local governments, through restriction on rangeland grazing, hunting, tourism, and development of resources on public and private lands. It may well be that, in some circumstances, the economic benefits of exclusion outweigh the conservation benefits of inclusion. The commenter suggested that such situations should be recognized by the Services and granted exclusion in order to provide maximum flexibility for a balanced mix of conservation and economic activities.

Our Response: The Services recognize that the listing of species may result in an economic impact; however, the Act does not allow the consideration of potential economic impacts when listing a species. The Act expressly limits the basis of our determination of the status of a species to the best scientific and commercial information available. The Services also cannot consider the potential economic impact of listing a species in an exclusion analysis under

section 4(b)(2) of the Act. This consideration of economics in the discretionary 4(b)(2) exclusion analysis is to be based on the incremental impacts that result solely from the designation of critical habitat, and not those impacts that may result from the listing of the species. 50 CFR 424.19.

We assume the commenter is referring to considerations of economics prior to finalizing a designation of critical habitat. The Services always consider potential economic impacts that may result from the designation of critical habitat. The purpose of the second sentence of section 4(b)(2) is to authorize the Secretaries to exclude particular areas from a designation if the benefits of exclusion outweigh the benefits of inclusion. The Services recognize that there may be circumstances when the economic benefits of exclusion (together with any other benefits of exclusion) do in fact outweigh the conservation benefits of inclusion (together with any other benefits of inclusion). In that case, the Services may decide to exclude the particular area at issue (unless exclusion will result in extinction of the species). The Services will evaluate the best available scientific information when undertaking a discretionary 4(b)(2) exclusion analysis.

Comment (33): A commenter noted that the Services should consider financial commitments made in HCPs, SHAs, and CCAAs. Proponents could commit serious finances only to have the area later designated as critical habitat.

Our Response: The Services do not consider the financial commitments made in HCPs, SHAs, or CCAAs, as a standalone factor when evaluating areas for exclusion. The Services, however, do consider the conservation benefits associated with financial commitments of a plan to reduce the benefits of including a particular area in critical habitat. The fostering and maintenance of conservation partnerships can be a benefit of exclusion, and can serve as an

incentive to future financial commitments to further conservation. The Services greatly value the on-the-ground conservation delivered by these partnerships and their associated permitted plans.

Comments on National Security

Comment (34): A commenter asked the Services to clarify how national-security concerns will be considered. The commenter stated that the Services say they will give “great weight” to these concerns, but this phrase is a subjective term and could use additional clarity. The use of the phrase implies national-security concerns will always outweigh the benefits of inclusion. The commenter recommends expanding or altering this phrase to better clarify how national-security concerns will be considered.

Our Response: The Services do not consider the phrase “great weight” to imply a predetermined exclusion based on national-security concerns, as the commenter is suggesting. The Services always consider for exclusion from the designation areas for which DoD, DHS, or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns. The agency requesting such exclusion must provide a reasonably specific rationale for such exclusion. The Service will weigh heavily those concerns regarding the probable incremental impact to national security as a result of designating critical habitat. This does not mean the Services will then in turn give little weight to any benefits of inclusion. It is not the Services’ intent to predetermine the outcome of a discretionary 4(b)(2) exclusion analysis.

General Comments

Comment (35): One commenter asked for an explanation of how the two proposed critical habitat rules and draft policy will work together, discussing the challenges and benefits they provide together. E.O. 13563 states that regulations “must promote predictability and reduce uncertainty.”

Our Response: The regulations and policy are intended to provide clarity, transparency, and certainty regarding the development and implementation of critical habitat, and provide for a more predictable and transparent process for designating critical habitat. All three initiatives work together to provide greater clarity to the public as to how the Services develop and implement critical habitat designations. The rule amending 50 CFR part 424 provides new definitions and clarifications that will inform the process of designating critical habitat. The rule revising the definition of “destruction or adverse modification” (at 50 CFR 402.02) redefines that term and clarifies its role in section 7 consultations. This policy focuses on how the Services implement section 4(b)(2) of the Act, with regard to excluding areas from critical habitat designations.

Comment (36): The draft policy states that it will be prospective only and will not apply to any “previously completed” critical habitat designations. One commenter stated the policy should more clearly state that the revised language will not be used in reassessing or reassigning critical habitat; only future designations of critical habitat will fall under the new policy.

Our Response: The commenter is correct that this final policy does not apply to designations of critical habitat finalized prior to the effective date of this policy (see **DATES**, above). This policy applies to future designations of critical habitat that are completed after the

effective date of this policy. If the Services choose to revise previous designations, the Services will use the operative regulations and policies in place at the time of such revision. Of course, as we have indicated elsewhere, this policy does not establish binding standards that mandate particular outcomes.

Comment (37): We received many comments that the policy proposed changes that were arbitrary and without merit, because they will deprive private property owners and States of incentives and tools to conserve species and their habitat.

Our Response: The Services have developed, and continue to develop, considerable tools to assist landowners in the conservation of species and their habitats. Nothing in this policy takes away from those tools and reliance on, and recognition of, collaborative conservation partnerships. Rather, the Services believe the elements of this policy provide greater clarity and certainty on how those conservation tools are regarded and evaluated when considering designations of critical habitat. Additionally, the Services' goal is to remove any real or perceived disincentive for voluntary conservation plans and collaborative partnerships, whether permitted under section 10 of the Act or developed outside of those provisions.

Comment (38): A commenter stated that monitoring and adaptive management of conservation plans should not be used as standards for determining exclusions. The commenter noted that critical habitat designations do not have this standard, which elevates the exclusionary determination above that which the Services use in their critical habitat designations.

Our Response: In order to exclude an area from critical habitat, the benefits of exclusion must outweigh those of inclusion, and the exclusion must not result in the extinction of the

species. As the commenter correctly notes, adaptive management and monitoring are not a prescribed part of critical habitat designations and implementation. However, monitoring the implementation of conservation actions is essential to determine effectiveness of such actions, and using adaptive management is critical to the long-term success of conservation plans. Therefore, these factors are important considerations in evaluating the degree to which the existence of the conservation plan reduces the benefits of inclusion of an area in critical habitat.

Comment (39): A commenter stated that in the list of eight factors the Services say they will consider when evaluating lands for exclusion based on non-permitted conservation plans, the Services should clarify what they mean by, “The degree to which there has been agency review and required determinations.” The commenter asked which agencies would review the conservation plan, agreement, or partnership—the Services, other Federal agencies, or State or local agencies? What determinations are “required determinations?”

Our Response: Should the Services choose to enter into the discretionary 4(b)(2) exclusion analysis, we would evaluate any information supplied by the requester for exclusion, including whether the plan has complied with applicable local, State, and Federal requirements, and any determinations required therein. For example, a county-level ordinance requiring habitat set-asides for development may require State environmental review and public scoping. This type of required review or determination would be taken into consideration when evaluating particular areas for exclusion. The Services are not prescribing any suite of required determinations. The burden is on the requester to provide relevant information pertaining to review of the plan by any agency. This is important information that will be used in our

evaluation of the effectiveness of a conservation plan in the discretionary 4(b)(2) exclusion analysis.

Comment (40): One commenter disagreed with the Services' proposal to consider whether a permittee “is expected to continue to [properly implement the conservation agreement] for the term of the agreement.” The commenter stated the Services should rely on their authority to revoke permits and revise critical habitat rather than speculating about future implementation of conservation agreements. Accordingly, the commenter requests that the Services remove the phrase “and is expected to continue to do so for the term of the agreement” from the first condition related to the exclusion of conservation plans related to section 10 permits.

Our Response: The Services need to evaluate whether there is reasonable certainty of implementation and completion of conservation plans. Permittees are expected to fulfill the provisions of their permits for the agreed-upon time period. However, given the voluntary nature of agreements, it is possible, even in permitted plans, that permittees may not implement the plan as conditioned or may cancel an agreement at any time. Therefore, certainty of the continuance of any conservation plan is an important consideration.

Comment (41): One commenter stated that the Services should emphasize the benefits of critical habitat and expressed disappointment that the Services’ draft policy attempts to minimize the actual benefits that derive from critical habitat with an extremely cursory description of critical habitat's benefits at the beginning of the preamble to the draft policy.

Our Response: The Services in no way intend to understate the important functions of critical habitat. We recognize that the primary threat faced by most endangered and threatened

species has been, and continues to be, loss and fragmentation of suitable habitat. Critical habitat designation is one conservation tool in the Act that attempts to address this situation, by identifying habitat features and areas essential to the conservation of the species. It provides educational benefits by bringing these important areas to the public's and landowners' attention, and requires consultation with the Services for proposed activities by Federal agencies, on Federal lands, or involving a Federal nexus, to ensure that such activities are not likely to cause the destruction or adverse modification of the critical habitat. These benefits are considered by the Services on a case-by-case basis in the context of the discretionary consideration of exclusions under Section 4(b)(2).

Comment (42): A commenter stated that the Services should clarify that this policy provides broad program guidance, not specific prescriptions of exclusion analysis and designation. It does not concern a specific action concerning a specific property. Also, the commenter stated the Services should point out that the 4(b)(2) policy could be used to avoid a Fifth Amendment taking if extensive property restrictions would occur due to critical habitat designation.

Our Response: We agree that the purpose of this policy is to provide guidance and clarity as to how the Services consider exclusions under section 4(b)(2) of the Act, rather than formulaic prescriptions as to how exclusion analyses are performed. As noted above, each area considered for exclusion from a particular critical habitat designation is unique, and the factors considered in such evaluation are fact-specific. Thus, there is no simple, one-size-fits-all approach; rather, the Services take a case-by-case approach in considering the factors in a weighing and balancing analysis, and the relative importance (or weight) of each of those factors.

The Services do not consider the designation of critical habitat to impose property restrictions such that a Fifth Amendment taking issue would arise.

Comment (43): One commenter noted that the Services should clarify that exclusion of private lands from critical habitat designation is not a “reward.” The commenter stated the draft policy may be perceived as contradictory to key messaging being promoted through outreach efforts to landowners and that the Services’ outreach messaging has been that critical habitat designation does not affect private landowners, unless their activity is authorized, funded, or carried out by a Federal agency. The commenter’s opinion is that the draft policy, however, appears to “reward” landowners by excluding their land from critical habitat if their land is covered by a conservation plan.

Our Response: We agree in part with the commenter. It is true that critical habitat does not create a regulatory impact on private lands where there is no Federal nexus, and that even when there is a Federal nexus, the potential impact of a designation of critical habitat sometimes is minimal. Nevertheless, the Services are keenly aware of the significant concerns that some landowners have about critical habitat. We also recognize that landowners invest time and money for proactive conservation plans on their lands. The Services do not exclude particular areas from a designation of critical habitat as a reward to landowners for conservation actions they undertake. Rather, the existence of a conservation plan; effective, implemented conservation actions; and a demonstrated partnership are relevant factors that should be considered in any discretionary 4(b)(2) analysis. If the Services find the benefits of exclusion outweigh inclusion based on the specific facts, the particular area covered by the conservation plan may be excluded, provided the exclusion will not result in the extinction of the species.

Comment (44): A commenter asked the Services to define “partnerships” and how they will be evaluated.

Our Response: Partnerships come in many forms. Some partnerships have a long-standing track record of the partners working together for the conservation of species and their habitat, some partnerships are newly formed, and others are generally anticipated to occur in the future. We greatly appreciate and value these conservation partnerships, and will consider the specifics of what each partnership contributes to the conservation of the species when conducting discretionary 4(b)(2) exclusion analyses. We will also consider the general benefits that excluding areas will have on encouraging future partnerships. Because the specifics and context of partnerships vary so much, we conclude that it would not be useful to attempt to expressly define “partnerships,” or to set out uniform guidance as to how they will be evaluated.

Comment (45): One commenter stated that the length of a conservation plan and the certainty it will continue to be implemented should be added to the criteria used to evaluate HCPs, SHAs, and CCAAs. None of the conditions account for the temporary nature of these agreements, nor is this aspect discussed elsewhere in the draft policy or preamble. A commenter recommended adding a fourth condition to address the expected longevity of the CCAA/SHA/HCP.

Our Response: We have already captured this in the first condition we evaluate, which states: “The permittee is properly implementing the CCAA/SHA/HCP and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is and has been fully implementing the commitments and provisions in the

CCAA/SHA/HCP, Implementing Agreement, and permit.” We have determined not to be more prescriptive than this, because we need to retain flexibility in our evaluations. We may use the track record of partnership in our discretionary 4(b)(2) exclusion analysis, which may include the length of the permitted plan. For example, some plans have long-term implementation schedules in which additional conservation measures are developed or phased in over time, so it would not be appropriate to expect all measures will be put into place immediately. The Services expect that plans will be fully implemented regardless of their term of agreement or operation. When issuing permits, the Services consider whether the term of any such plan is sufficient to produce meaningful conservation benefits to the species. Therefore, it is not necessary in all cases to evaluate the term of a permit as a condition for exclusion from critical habitat. However, the Services have retained their flexibility to evaluate plans on a case-by-case basis, and may consider the term of the plan if appropriate.

Comments Regarding Transportation Infrastructure

Comment (46): A commenter requested that the Services exclude transportation infrastructure from critical habitat designations. The commenter suggested that a new paragraph or policy element be added. The paragraph would state the Services will always consider in their discretionary exclusion analysis that dedicated transportation infrastructure and rights-of-way (ROWs) be excluded from critical habitat, given that transportation lands are managed primarily for the use and safety of the travelling public and usually have very little conservation value for listed species.

Our Response: The Services recognize the importance of maintaining transportation infrastructure and ROWs for the safe conveyance of people and goods. However, the Services do not agree that creating a dedicated policy element giving great weight and consideration to exclusion of transportation infrastructure and ROWs is necessary. Some areas seemingly included within the overall boundaries of critical habitat designations consist of manmade structures and impervious surfaces that do not contain the features essential to the conservation of a species. This occurs because of the scale and resolution of the maps used to depict critical habitat. To remedy this, all regulations designating critical habitat contain language stating that manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located are not included in critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to the requirement that the Federal agency insure that the action is not likely to adversely modify critical habitat, unless the specific action would affect the physical or biological features in the adjacent critical habitat.

Portions of ROWs may not contain manmade structures, and may be included in areas that otherwise meet the definition of “critical habitat.” In some cases, the footprint of ROWs themselves may not have the features essential to the conservation of the species at issue. In this case, should the Services engage in a discretionary 4(b)(2) exclusion analysis, the Services may determine that there is little or no benefit of inclusion, and that the benefits of exclusion outweigh the benefits of inclusion, and, therefore, decide to exclude the ROWs from the designation.

Comment (47): The designation of critical habitat on an airport may serve to attract wildlife to the airport environment. The Federal Aviation Administration (FAA) requests that an element be added to the policy that would convey great weight and consideration to excluding aircraft-movement areas, runway and taxi areas, object-free areas, and runway-protection zones from designations of critical habitat. Designation of critical habitat could also impair the airport owner's ability to expand facilities, and thus have economic costs. FAA requests that safety be a specific consideration in any exclusion analysis.

Our Response: The Services disagree that a dedicated policy element is needed in this particular instance. When identifying areas that meet the definition of “critical habitat,” the Act does not authorize the Services to consider landownership. It is a process that relies on the best scientific data available to determine the specific occupied areas containing features essential to the conservation of a species that may require special management considerations or protection and unoccupied areas that may be essential for the conservation of the species. Active airport areas that do not meet the definition of “critical habitat” (i.e., occupied areas that do not contain the features essential to the conservation of a particular species that may require special management considerations or protection or unoccupied areas that are not essential for the conservation of the species) will not be designated critical habitat. As mentioned above, manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located are generally not included in critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to the requirement that the Federal agency insure that the action is not likely to destroy or adversely modify critical habitat, unless the specific action would affect the physical or biological features in the adjacent critical habitat.

In some particular instances, the Services may identify areas within airport boundaries that meet the definition of “critical habitat” as applied to a particular species. In these instances, the Services generally would consider any request for exclusion from the designation received from airport managers or FAA under the general authority of section 4(b)(2) or applicable elements of this policy, e.g., the non-permitted plans and partnerships provision of this policy. In addition, the Services encourage airport managers to consider developing HCPs that would address incidental take of listed species and conservation of their habitat.

Comments on NEPA Requirements

Comment (48): The Services have determined that a categorical exclusion (CE) from the NEPA requirements applies to the draft policy. CEs address categories of actions that do not individually or cumulatively have a significant effect on the human environment. The commenter stated that a CE is not appropriate for NEPA compliance on issuance of this draft policy, given the potential expansion in future critical habitat designations and the significant effect on environmental and economic resources in areas to be designated as a result of these initiatives.

The commenter asserted that the Services’ proposed actions constitute a “major federal action significantly affecting the quality of the human environment” (42 U.S.C. part 4321, et seq.). Furthermore, the commenter noted, the Services are required to prepare a full Environmental Impact Statement (EIS), in draft and final, as part of this process and prior to any final Federal decisionmaking on the proposed rules and guidance. An EIS is justified by the sweeping geographic scope of the proposals and their potentially significant effects on

environmental resources, land-use patterns, growth and development, and regulated communities.

Our Response: Following our review of the statutory language of section 4(b)(2) and our requirements for compliance under the National Environmental Policy Act of 1969 (NEPA), we find that the categorical exclusion found at 43 CFR 46.210(i) and NOAA Administrative Order 216–6 applies to this policy. As reflected in the DOI regulatory provision, the Department of the Interior has found that the following category of actions would not individually or cumulatively have a significant effect on the human environment and is, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: “Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature” NOAA Administrative Order 216–6 contains a substantively identical exclusion for “policy directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature.” Section 6.03c.3(i). The NOAA provision also excludes “preparation of regulations, Orders, manuals or other guidance that implement, but do not substantially change these documents, or other guidance.” *Id.*

At the time the DOI categorical exclusion was promulgated, there was no preamble language that would assist in interpreting what kinds of actions fall within the categorical exclusion. However, in 2008, the preamble for a language correction to the categorical exclusion provisions gave as an example of an action that would fall within the exclusion the issuance of guidance to applicants for transferring funds electronically to the Federal Government

This final policy is an action that is fundamentally administrative or procedural in nature. Although the policy addresses more than the timing of procedural requirements, it is nevertheless administrative and procedural in nature, because it goes no further than to clarify, in expressly

non-binding terms, the existing 4(b)(2) exclusion process by describing how the Services undertake discretionary exclusion analyses as a result of statutory language, legislative history, case law, or other authority. This final policy is meant to complement the revisions to 50 CFR 424.19 regarding impact analyses of critical habitat designations and provide for a more predictable and transparent critical-habitat-exclusion process. This final policy is nonbinding and does not limit Secretarial discretion because it does not mandate particular outcomes in future decisions regarding exclusions from critical habitat. As elaborated elsewhere in this final policy, the exclusion of a particular area from a particular critical habitat designation is, and remains, discretionary.

Specifically, this final policy explains how the Services consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. The policy does not constrain the Services' discretion in making decisions with respect to exclusions from critical habitat. The considerations in this policy are consistent with the Act, its legislative history, and relevant circuit court opinions. Therefore, the policy statements are of an administrative (e.g., describing the current practices of the Service that have come about as a result of legislative history, case law, or other authority), technical (e.g., edits for plain language), and/or procedural (e.g., clarifying an existing process for a Service or NMFS activity) nature.

FWS reviewed the regulations at 43 CFR 46.215: Categorical Exclusions: Extraordinary Circumstances, and we have determined that none of the circumstances apply to this situation. Although the final policy will provide for a credible, predictable, and transparent critical-habitat-exclusion process, the effects of these changes would not “have significant impacts on species

listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species,” as nothing in the policy is intended to determine or change the outcome of any critical habitat determination. Moreover, the policy would not require that any previous critical habitat designations be reevaluated on this basis. Furthermore, the 4(b)(2) policy does not “[e]stablish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects” (43 CFR 46.215(e)). None of the extraordinary circumstances in 43 CFR 46.215(a) through (l) apply to the policy on implementing section 4(b)(2) of the Act.

NMFS also reviewed its exceptions and has found that this policy does not trigger any of the exceptions that would preclude reliance on the categorical exclusion provisions. It does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species or their habitats. NOAA Administrative Order 216–6, § 5.05c.

Comment (49): A commenter stated that NEPA review should not be a standard when evaluating conservation plans and that the Services should not evaluate whether a conservation plan, agreement, or partnership was subject to NEPA review when determining whether to exclude areas from critical habitat designations. See 79 FR 27057 (May 12, 2014) (section 2.d. of the draft policy). Consideration of this factor discounts the many worthwhile conservation plans developed by private entities and State and local governments. The commenter stated that

because NEPA only requires analysis of Federal actions (see 42 U.S.C. 4332(2)(C)), conservation plans that are not approved by a Federal agency—such as those developed by citizens and State and local governments—would not undergo NEPA review. States, which are principal managers of wildlife within their borders, frequently develop conservation plans to benefit listed and non-listed species. Also, landowners can establish conservation banks or conservation easements without NEPA review or public input. Thus, the commenter stated that the application of this factor to plans and agreements for which they are often inapplicable would seem to automatically weigh against exclusion in most instances. Instead, the commenter suggests that the Services should focus on the effectiveness of the plan and its conservation value, regardless of the procedural processes used to establish the plan.

Our Response: The list of factors the Services will consider in connection with exclusion analysis of non-permitted plans seems to have been misunderstood as absolute requirements for excluding areas covered by such plans. For some plans that the Services may evaluate (those that are Federal and may have a significant impact on the environment), it would be appropriate to consider whether NEPA reviews have been completed; for other plans, it may not be. The Services are not suggesting that every plan needs to have undergone NEPA review. Not all of the items listed under paragraph 2 (described above under the heading, *Private or Other Non-Federal Conservation Plans and Partnerships, in General*) are needed to ensure the Services consider a plan. To this end, the Services have modified the language preceding the list of factors for evaluating non-permitted conservation plans, to clarify that some of the factors may not be relevant to all plans.

Specific Language Suggested by Commenters

Comment (50): Several commenters suggested specific line edits or word usage.

Our Response: We have addressed these comments as appropriate in this document.

Comment (51): A commenter suggested changing the phrase “and meets the conservation needs of the species” to “and maintains the physical or biological features essential for the conservation of the species” in draft policy element 3(c), which relates to permitted plans under section 10 of the Act. This change is suggested to maintain consistency in the use of terms related to critical habitat designations and exclusions.

Our Response: The Services have elected not to make the suggested change. The language in question refers to permitted HCPs, SHAs, and CCAAs, and more specifically their underlying conservation plans. Plans developed to support these conservation vehicles are not necessarily designed using the terminology applicable to critical habitat designation. Therefore, we conclude that it is more appropriate to retain the more general language used in our proposal.

Comment (52): One commenter stated it will be very difficult for the Services to determine if excluding one piece of habitat “will result in the extinction of a species,” as stated in the draft policy element 8. Therefore, the commenter recommends the language be changed to express a likelihood the action will result in the extinction of the species and stated this determination should be made according to the best available science. The commenter suggests the following as replacement language: “We must not exclude an area if the best available science indicates that failure to designate it will likely result in the extinction of the species.”

Our Response: Part 8 of the policy is a restatement of the statutory provision of the Act that states the Secretary shall not exclude an area if the exclusion will result in the extinction of the species concerned. To the extent that the statutory language is ambiguous, we decline to interpret it at this time.

Comment (53): One commenter remarked there remains a fair amount of vague language in the factors that are considered during a discretionary 4(b)(2) exclusion analysis. Specifically, the commenter stated it is unclear if factors that begin with “Whether” will rank higher if the answer is affirmative. Also, factors that begin with “The degree to which,” “The extent or,” and “The demonstrated implementation” must be clarified and quantified before they can be appropriately and fairly assigned weight in a designation of critical habitat.

Our Response: The examples of language noted above from the draft policy were carefully chosen. As this is a policy and not a regulation, the Services chose language such as “the degree to which” to accommodate the gradations and variations in certain fact patterns relating to conservation partnerships and plans. Not all plans and partnerships are developed in the same manner, and no one set of evaluation criteria would apply. Rather, the Services’ intent in drafting the language was to provide latitude in evaluating different types of plans and partnerships. Further, the commenter does not provide any examples of how to quantify measures, nor does the commenter provide alternate language or suggested revisions to this section of the policy.

Comment (54): One commenter suggested adding an additional factor under non-permitted plans and partnerships, “Plans must be reasonably expected to achieve verifiable, beneficial results to qualify for exclusion from critical habitat designation.”

Our Response: We appreciate the suggestions, but we believe these factors are already captured in the factors in the policy under paragraphs 2.f. (“The degree to which the plan or agreement provides for the conservation of the essential physical or biological features for the species.”) and 2.h. (“Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.”) The existence of a monitoring program and adaptive management (paragraph 2.h.) speaks to verifiable results, and the statements regarding providing for the conservation of the essential features and effective conservation measures (paragraph 2.f.) relate to beneficial results. Therefore, we did not adopt the suggested additions.

Comment (55): One commenter suggested adding a fourth condition under the permitted plans section of the policy: “If plans cannot be implemented or do not achieve the intended results, a re-evaluation of critical habitat designation may be required.”

Our Response: As discussed in this final policy in the framework section, we base the exclusion not only on the plan, but on the conservation partnership. Therefore, our first step would be to work with that partner to implement the plan, bring the plan into compliance, or adjust the conservation management or objectives of the plan to be effective for the conservation of the covered species. We of course retain the authority under the Act to revise the designation, if necessary, through the rulemaking process to include these areas in critical habitat, if

appropriate. For the above reasons, while we considered the suggestion to add a policy element, we have determined that it is not necessary.

Comment (56): One commenter suggested adding the following language to the draft policy element paragraph 5: “If the agency requesting the exclusion does not provide us with a specific justification, we will contact the agency to require that it provide a specific justification. When the agency provides a specific justification, we will defer to the expert judgment of the DoD, DHS, or another Federal agency.”

Our Response: The suggested text is paraphrased from the policy preamble. Therefore, the Services do not agree that this language adds substantively to the clarity of the policy, and we did not adopt this suggestion.

Comment (57): A commenter suggested we add the following language to the policy regarding private lands: “The Service recognizes that many listed species are found primarily or partially on private lands. For some endemic species, their entire range may be wholly on private lands, making partnerships with those landowners far more valuable than any expected gain that might be achieved through the incremental gains expected through a critical habitat designation and subsequent section 7 consultations. We acknowledge the potential incremental gain in conservation value from designating critical habitat on private land can be undermined if the landowner is not a partner in that designation or is opposed to that designation. Private land tracts that are proposed as critical habitat are likely to maximize their recovery value for listed species if the landowner is amenable to conservation and recovery activities on their lands. Therefore, landowners whose property has been proposed as critical habitat and wish to be

excluded from that designation will be given serious consideration for exclusion if they provide information concerning how the lands will be managed for the conservation of the species.”

Our Response: The Services generally will consider exclusion of private lands from a designation of critical habitat if specifically requested. Private lands are needed for the conservation of endangered and threatened species. If a private landowner requests exclusion, and provides a reasoned rationale for such exclusion, including measures undertaken to conserve species and habitat on the land at issue (such that the benefit of inclusion is reduced), the Services would consider exclusion of those lands. However, the Services decline to include a policy element in this policy covering this particular suggestion.

Comment (58): A commenter suggested that we give great weight and consideration to exclusion of lands whose landowners allow access to their lands for purposes of surveys, monitoring, and other conservation and research activities.

Our Response: The Services would consider and give appropriate weight, on a case-by-case basis, to the benefits of the information gathered, should the Secretaries choose to enter into the discretionary 4(b)(2) exclusion analysis. If not yet established, we hope that arrangements of this sort with landowners could lead to conservation partnerships in the future. Development of those partnerships could result in furthering the conservation of the species.

Comment (59): A commenter suggested that the Services should include specific text in the policy regarding the importance of private landowner partnership and cooperation in species recovery efforts. Furthermore, the commenter suggests the Services give great weight to

excluding private lands whose owners have expressed interest in participation in voluntary recovery efforts.

Our Response: The Services agree that recovery of listed species relies on the cooperation of private landowners and managers. The commenter brings to light an inherent tension with listing and recovery under the Act. One might think that the process of listing, designating critical habitat, developing a recovery plan, carrying out recovery plan objectives, and ultimately delisting a species should be a linear process. It is not. Adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants and identifying areas that meet the definition of “critical habitat” are science-based processes. Areas meeting the definition of “critical habitat” for a given species must be identified as eligible for designation as critical habitat, regardless of landownership or potential future conflict with recovery opportunities, such as mentioned by the commenter. The Secretary may, however, exclude areas based on non-biological factors. The subject of this policy is to make transparent how the Services plan to address certain fact patterns under which the Secretaries will consider excluding particular areas from a designation. The presumption of cooperation for purposes of recovery of a species is not a particular fact pattern the Services have chosen to include, but is inherently captured under the partnership element of this policy. As stated in the permitted plans section of this policy, the Services would not weigh heavily a prospective partnership in which a landowner merely may choose to cooperate with the Services. If habitat-based threats are the main driver for a species’ listing, the designation of critical habitat could be an important tool for species conservation.

Comment (60): We received numerous specific comments in several categories that were not directly relevant to this final policy on exclusions from critical habitat, and, therefore, they

are not addressed in this section. While not directly relevant to this policy, we may address some of these issues in future rulemaking or policy development by the Services. These include:

- Issues regarding earlier coordination with States in the designation of critical habitat;
- Development and designation processes for critical habitat;
- Development of conservation plans;
- Relocation of existing critical habitat designations from airport lands; and
- Nonessential experimental populations.

Required Determinations

We intend to look to this policy as general non-binding guidance when we consider exclusions from critical habitat designations. The policy does not limit the Secretaries' discretion in particular designations. In each designation, we are required to comply with various Executive Orders and statutes for those individual rulemakings. Below we discuss compliance with several Executive Orders and statutes as they pertain to this final policy.

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this final policy is a significant action because it may create a serious inconsistency with other agency actions.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving

regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that our regulatory system must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this policy in a manner consistent with these requirements.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) We find this final policy will not “significantly or uniquely” affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this policy will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. Small governments will not be affected because the final policy will not place additional requirements on any city, county, or other local municipalities.

(b) This final policy will not produce a Federal mandate on State, local, or Tribal governments or the private sector of \$100 million or greater in any year; that is, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. This policy will impose no obligations on State, local, or Tribal governments because this final policy is meant to complement the amendments to 50 CFR 424.19, and is intended to clarify expectations regarding critical habitat and provide for a more predictable and transparent critical-habitat-exclusion process. The only entities directly affected by this final policy are the FWS and NMFS. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with Executive Order 12630, this final policy will not have significant takings implications. This final policy will not pertain to “taking” of private property interests, nor will it directly affect private property. A takings implication assessment is not required because this final policy (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This final policy will substantially advance a legitimate government interest (clarify expectations regarding critical habitat and provide for a more predictable and transparent critical-habitat-exclusion process) and will not present a barrier to all reasonable and expected beneficial use of private property.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this final policy does not have Federalism implications and a Federalism summary impact statement is not required. This final policy pertains only to exclusions from designations of critical habitat under section 4 of the Act, and will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), this final policy will not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of

the Order. The clarification of expectations regarding critical habitat and providing a more predictable and transparent critical-habitat-exclusion process will make it easier for the public to understand our critical-habitat-designation process, and thus should not significantly affect or burden the judicial system.

Paperwork Reduction Act of 1995

This final policy does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This final policy will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

We have analyzed this policy in accordance with the criteria of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(c)), the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), the Department of the Interior's NEPA procedures (516 DM 2 and 8; 43 CFR part 46), and NOAA's Administrative Order regarding NEPA compliance (NAO 216-6 (May 20, 1999)).

We have determined that this policy is categorically excluded from NEPA documentation requirements consistent with 40 CFR 1508.4 and 43 CFR 46.210(i). This categorical exclusion applies to policies, directives, regulations, and guidelines that are “of an administrative, financial, legal, technical, or procedural nature.” This action does not trigger an extraordinary

circumstance, as outlined in 43 CFR 46.215, applicable to the categorical exclusion. Therefore, this policy does not constitute a major Federal action significantly affecting the quality of the human environment.

We have also determined that this action satisfies the standards for reliance upon a categorical exclusion under NOAA Administrative Order (NAO) 216–6. Specifically, the policy fits within two categorical exclusion provisions in § 6.03c.3(i)—for “preparation of regulations, Orders, manuals, or other guidance that implement, but do not substantially change these documents, or other guidance” and for “policy directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature.” NAO 216–6, § 6.03c.3(i). The policy would not trigger an exception precluding reliance on the categorical exclusions because it does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species or their habitats. *Id.* § 5.05c. As such, it is categorically excluded from the need to prepare an Environmental Assessment. Issuance of this rule does not alter the legal and regulatory status quo in such a way as to create any environmental effects.

Government-to-Government Relationship with Tribes

In accordance with Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”, November 6, 2000), the Department of the Interior Manual at 512 DM 2, the Department of Commerce (DOC) Tribal Consultation and Coordination Policy (May 21,

2013), DOC Departmental Administrative Order (DAO) 218-8, and NOAA Administrative Order (NAO) 218-8 (April 2012), we have considered possible effects of this final policy on federally recognized Indian Tribes. Following an exchange of information with tribal representatives, we have determined that this policy, which is general in nature, does not have tribal implications as defined in Executive Order 13175. Our intent with this policy is to provide non-binding guidance on our approach to considering exclusion of areas from critical habitat, including tribal lands. This policy does not establish a new direction. We will continue to collaborate and coordinate with Tribes on issues related to federally listed species and their habitats and work with them as we promulgate individual critical habitat designations, including consideration of potential exclusions on the basis of tribal interests. *See* Joint Secretarial Order 3206 (“American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act”, June 5, 1997).

Energy Supply, Distribution, or Use

Executive Order 13211 “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final policy is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Policy on Implementation of Section 4(b)(2) of the Act

1. The decision to exclude any particular area from a designation of critical habitat is always discretionary, as the Act states that the Secretaries “may” exclude any area. In no circumstances

is an exclusion of any particular area required by the Act.

2. When we undertake a discretionary 4(b)(2) exclusion analysis, we will evaluate the effect of non-permitted conservation plans or agreements and their attendant partnerships on the benefits of inclusion and the benefits of exclusion of any particular area from critical habitat by considering a number of factors. The list of factors that we will consider for non-permitted conservation plans or agreements is shown below. This list is not exclusive; all items may not apply to every non-permitted conservation plan or agreement and are not requirements of plans or agreements.
 - a. The degree to which the record of the plan supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership.
 - b. The extent of public participation in the development of the conservation plan.
 - c. The degree to which there has been agency review and required determinations (e.g., State regulatory requirements), as necessary and appropriate.
 - d. Whether National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) compliance was required.
 - e. The demonstrated implementation and success of the chosen mechanism.
 - f. The degree to which the plan or agreement provides for the conservation of the essential physical or biological features for the species.
 - g. Whether there is a reasonable expectation that the conservation management strategies and actions contained in the conservation plan or agreement will be implemented.
 - h. Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response

to new information.

3. When we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider areas covered by a permitted candidate conservation agreement with assurances (CCAA), safe harbor agreement (SHA), or habitat conservation plan (HCP), and we anticipate consistently excluding such areas from a designation of critical habitat if incidental take caused by the activities in those areas is covered by the permit under section 10 of the Act and the CCAA/SHA/HCP meets all of the following conditions:
 - a. The permittee is properly implementing the CCAA/SHA/HCP and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is and has been fully implementing the commitments and provisions in the CCAA/SHA/HCP, Implementing Agreement, and permit.
 - b. The species for which critical habitat is being designated is a covered species in the CCAA/SHA/HCP, or very similar in its habitat requirements to a covered species. The recognition that the Services extend to such an agreement depends on the degree to which the conservation measures undertaken in the CCAA/SHA/HCP would also protect the habitat features of the similar species.
 - c. The CCAA/SHA/HCP specifically addresses that species' habitat and meets the conservation needs of the species in the planning area.

We generally will not rely on CCAAs/SHAs/HCPs that are still under development as the basis of exclusion of a particular area from a designation of critical habitat.

4. When we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider exclusion of Tribal lands, and give great weight to Tribal concerns in analyzing the benefits of exclusion. However, Tribal concerns are not a factor in determining what areas, in the first

instance, meet the definition of “critical habitat.”

5. When we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider exclusion of areas for which a Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, and will give great weight to national-security or homeland-security concerns in analyzing the benefits of exclusion. National-security and/or homeland-security concerns are not a factor, however, in the process of determining what areas, in the first instance, meet the definition of “critical habitat.”
6. Except in the circumstances described in 5 above, we will focus our exclusions on non-Federal lands. Because the section 7(a)(2) consultation requirements apply to projects carried out on Federal lands where there is discretionary Federal involvement or control, the benefits of designating Federal lands as critical habitat are typically greater than the benefits of excluding Federal lands or of designating non-Federal lands.
7. When the Services are determining whether to undertake a discretionary 4(b)(2) exclusion analysis as a result of the probable incremental economic impacts of designating a particular area, it is the nature of those impacts, not necessarily a particular threshold level, that is relevant to the Services' determination.
8. For any area to be excluded, we must find that the benefits of excluding that area outweigh the benefits of including that area in the designation. Although we retain discretion because we cannot anticipate all fact patterns that may occur, it is the general practice of the Services to exclude an area when the benefits of exclusion outweigh the benefits of inclusion. We must not exclude an area if the failure to designate it will result in the extinction of the species.

Authors

The primary authors of this policy are the staff members of the Endangered Species Program, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, Falls Church, VA 22041-3803, and the National Marine Fisheries Service's Endangered Species Division, 1335 East-West Highway, Silver Spring, MD 20910.

Authority

The authority for this action is section 4(h) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 29, 2016

Signed: Michael J. Bean

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

Michael J. Bean

~~Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act~~

Dated:

January 29, 2016

Signed:

A handwritten signature in blue ink, appearing to read "Samuel D. Rauch, III", written over a horizontal line.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

~~Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act~~



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Bulletin

Federal Agencies Finalize Revised Rules to Improve Implementation of the Endangered Species Act
Commonsense revisions will clarify, improve processes for designating and implementing critical habitat to protect nation's wildlife

February 5, 2016

Contact(s):

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Building on the success of the Obama Administration in improving regulations and in implementing the Endangered Species Act (ESA) in new and innovative ways (<https://www.doi.gov/pressreleases/us-fish-and-wildlife-service-and-noaa-propose-actions-to-build-on-successes-of-endangered-species-act>), the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (together, the Services) today finalized a policy and two rules that will provide a clearer, more consistent and predictable process for designating critical habitat.

"The Endangered Species Act is the last safety net between our most at-risk species and extinction, and as such, we want to do everything we can to make sure it functions efficiently and effectively," said Gary Frazer, the Fish and Wildlife Service's Assistant Director for Ecological Services. "These commonsense administrative improvements are the product of an open and interactive public process that solicited feedback from diverse stakeholders. Ultimately, they will better equip us to protect our nation's wildlife."

"America's fish, wildlife and plant resources belong to us all, and ensuring the health of imperiled species is a shared responsibility," said Donna Wieting, Director of NOAA Fisheries' Office of Protected Resources. "These regulations are meant to clarify expectations and provide for credible and predictable designation and consultation processes which improve our ability to conserve and recover imperiled species."

Critical habitat represents areas that are essential for recovering a species—the ultimate goal of the ESA. The ESA requires, with few exceptions, that critical habitat be designated for all listed species. Critical habitat designations do not create reserves or protected areas, alter land ownership or authorize federal access to private lands. The general public is not responsible for addressing the loss

of critical habitat unless there is a connection with a federal agency, such as a permit or grant. The purpose of critical habitat is to require federal agencies to consult with the Services to ensure that any actions they authorize, fund or carry out are not likely to result in the “destruction or adverse modification” of designated critical habitat.

One rule revises the definition of “destruction or adverse modification.” It retains the current focus of the Services’ review of federal actions on how those actions affect the “physical or biological features essential to the conservation of a listed species,” and the ability of that habitat to support the species throughout its life cycle, and to meet the species’ recovery needs. Incorporating this approach into a revised regulation will improve the predictability and transparency of these determinations for federal agencies and the public.

The previous regulatory definition was invalidated by the courts in 2004. The revised definition, which is consistent with the ESA, its legislative history and circuit court opinions, codifies the approach the Services have employed since 2004. As a result, this rule is not expected to be substantially more or less protective of critical habitat.

The other rule clarifies the procedures and standards used for designating critical habitat, making minor changes to the regulations to better describe the scope and purpose of critical habitat, and clarify the criteria for designating critical habitat. This rule also revises the Services’ regulations to be consistent with statutory amendments made in 2004 that make certain lands managed by the Department of Defense ineligible for designation as critical habitat. The Services believe these changes will enhance the consistency and efficiency of the critical habitat designation process.

The new policy is intended to provide greater predictability, transparency and consistency regarding how the Services consider exclusion of areas from critical habitat designations. Under the ESA, the Services evaluate the economic, national security and other impacts of a designation and may exclude particular areas if the benefits of doing so are greater than the benefits of designation, so long as the exclusion will not result in the extinction of the species. This final policy describes the general position of the Services for considering different situations relative to the exclusion process (e.g., voluntary conservation agreements, national security, economics).

These regulatory improvements are consistent with Executive Order 13563, which calls for a retrospective analysis of existing rules to make the agency’s regulatory program more effective and less burdensome in achieving the regulatory objectives, and was included in the Department of the Interior’s *Final Plan for Retrospective Regulatory Review* (<https://www.doi.gov/open/regsreview>).

The Endangered Species Act is an essential tool for conserving the nation’s most at-risk wildlife, as well as the land and water on which they depend for habitat. The ESA has prevented more than 99 percent of the species listed from going extinct, serving as the critical safety net for wildlife that Congress intended when it passed the law 40 years ago. In addition, the ESA has helped move many species from the brink of extinction to the path to recovery, including California condors, Florida panthers and whooping cranes. The Obama Administration has delisted more species due to recovery than any prior administration, including the Oregon chub, Virginia northern flying squirrel and brown pelican.

For more information, including the final notices submitted to the *Federal Register*, visit www.fws.gov/endangered/improving_esa/reg_reform.html (http://www.fws.gov/endangered/improving_esa/reg_reform.html).

The mission of the U.S. Fish and Wildlife Service is working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. We are both a leader and trusted partner in fish and wildlife conservation, known for our scientific excellence, stewardship of lands and natural resources, dedicated professionals, and commitment to public service. For more information on our work and the people who make it happen, visit www.fws.gov (<http://www.fws.gov>).

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Last updated: December 4, 2015

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CENTER for BIOLOGICAL DIVERSITY

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For Immediate Release, February 5, 2016

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[More press releases](#)Contact: Brett Hartl, (202) 817-8121, Bhartl@biologicaldiversity.org

Obama Administration Weakens Critical Habitat Protections for Nation's Endangered Species

New Regulation Allows Widespread Destruction of Habitat, Increasing Risk to Plants, Animals From Death-by-a-Thousand-Cuts

WASHINGTON— A new [regulation](#) finalized today by the Obama administration will put hundreds of endangered plants and animals at greater risk of extinction by dramatically reducing protections for their designated critical habitat. The regulation green-lights development, logging, mining and other destructive activities in critical habitat for endangered species as long as these activities aren't determined to impact the *entirety* of a species' designated critical habitat. The regulation, however, does nothing to ensure that many projects combined do not drive species to extinction from death-by-a-thousand-cuts.

"This regulation is a big step backward for protection of our country's endangered species," said Brett Hartl, endangered species policy director at the Center for Biological Diversity. "Given that habitat destruction is the leading cause of species endangerment and extinction, this regulation makes no sense and is a big disappointment from the Obama administration."

Under the Endangered Species Act, federal agencies must avoid destroying or adversely modifying areas designated as critical habitat for endangered species in actions they permit, fund or carry out, including thousands of development, logging, drilling, mining and other projects every year. The new regulation limits this protection by prohibiting only those federal actions that impact all of a species' designated critical habitat.

"This regulation is nothing more than a giveaway to powerful special interests like the oil and gas, timber and mining industries," said Hartl. "You can't protect and recover endangered species without protecting the places they live."

It is already extremely rare for the U.S. Fish and Wildlife Service to stop projects to avoid adverse modification of critical habitat. A recent [study](#) in the Proceedings of National Academy of Sciences determined that in the past eight years, only 0.0023 percent of federal projects were stopped to protect endangered species, compared to the 1970s through the 1990s when approximately 1 percent of projects were stopped. This new rule will make it even less likely that the Service protects habitat for species.

The administration also issued a policy today that allows the Fish and Wildlife Service to exclude areas from critical habitat based on, in many cases, vague promises from landowners to conserve habitat.

Over the past five years, the Obama administration has enacted several other administrative changes to the Endangered Species Act that collectively weaken its effectiveness, including a [policy](#) that drastically limits which species get protection in the first place, a [final rule](#) that gives federal agencies carte blanche to ignore cumulative impacts of multiple activities on endangered species, and a [proposed rule](#) that would dramatically curtail the rights of ordinary Americans to participate in the implementation of the Act.

"With these policies, rules and regulations, the Obama administration has weakened the Endangered Species Act more than any administration since the landmark law was passed in 1973," said Hartl.

The Center for Biological Diversity is a national, nonprofit conservation organization with more than 990,000 members and online activists dedicated to the protection of endangered species and wild places.

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P.O. Box 710 • Tucson, AZ 85702-0710 tel: (520) 623.5252 fax: (520) 623.9797 www.BiologicalDiversity.org

[Go back](#)

From: Dan Pope

Sent: Tuesday, February 9, 2016 11:27 AM

To: Steve Emrick

Subject: New York Times Article villainizing farming on the Westside of the San Joaquin Valley

Attachments: NYT.Farmers Try Political Force to Twist Open CA's Taps.12.30.15 Medina.docx

Steve,

Thanks for talking over some of the CPRA issues with me the other day. Attached is a copy of the recent NY Times article issued the other day. It is unfortunate successful farmers are now villainized for making sound business decisions to sustain their livelihood.

Regards,

Dan

Farmers Try Political Force to Twist Open California's Taps

Few in agriculture have shaped the debate over water more than the several hundred owners of an arid finger of farmland west of Fresno.

New York Times By MICHAEL WINES and JENNIFER MEDINA DEC. 30, 2015

FIVE POINTS, Calif. — The message that Maria L. Gutierrez gave legislators on Capitol Hill was anguished and blunt: California's historic drought had not merely left farmland idle. It had destroyed Latino farm workers' jobs, shuttered Latino businesses and thrown Latino families on the street. Yet Congress had turned a deaf ear to their pleas for more water to revive farming and farm labor.

So Latinos — the nation's fastest-growing ethnic group, she noted pointedly — were sending a warning that politicians could not ignore.

"We created an organization that's called [El Agua Es Asunto de Todos](#) — Water Is Everybody's Business — so the Latino voice can be heard," Ms. Gutierrez, who described herself as an El Agua volunteer, said in October 2013 at the meeting with lawmakers. "Don't devastate our economy. Don't take our jobs away."

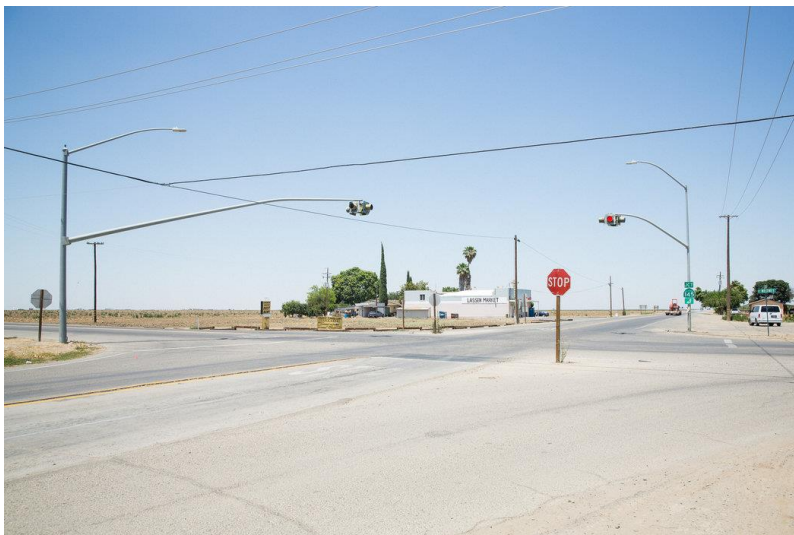
The group has since blanketed California with demands for more water on Spanish-language television, on the Internet, even on yard signs. But for whom it speaks is another matter: El Agua is bankrolled by more than \$1.1 million from the [Westlands Water District](#), the nation's largest agricultural irrigation contractor, a state entity created at the behest of — and largely controlled by — some of California's wealthiest and most politically influential farmers.

For almost five decades, Westlands has brought its farmers a torrent of water from the reservoirs and aqueducts of the federal [Central Valley Project](#), the vast public work that irrigates half of California agriculture. [Drought](#) has reduced that torrent to drops, and El Agua is one part of Westlands' wide-ranging effort to open the spigots again.

Photo



Maria Salazar, right, shopped at a yard sale held by Selena Rodriguez, left, at an apartment complex in Huron, Calif., near farmland that is part of the Westlands Water District. Credit Damon Winter/The New York Times Photo



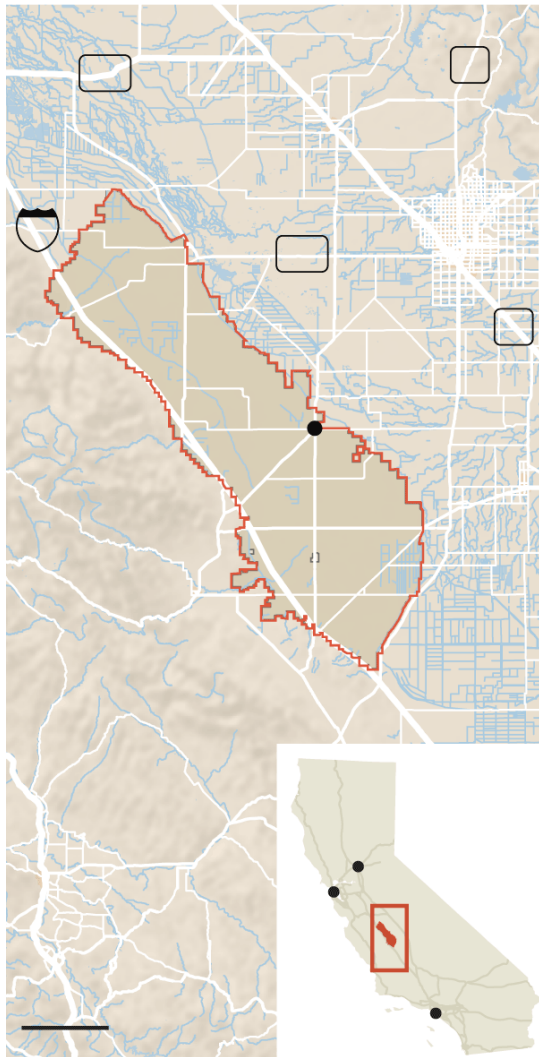
The main intersection of Five Points, a farming town in the district. Credit Damon Winter/The New York Times

California has [more than 81,000 farms](#), and farmers claim four-fifths of all the water its citizens consume. But no one in agriculture has shaped the debate over water more — or swung their elbows wider — than the few hundred owners of an arid, Rhode Island-size finger of farmland west of Fresno.

A water utility on paper, Westlands in practice is a formidable political force, a \$100 million-a-year agency with five lobbying firms under contract in Washington and Sacramento, a staff peppered with former federal and congressional powers, a separate political action committee representing farmers and a government-and-public-relations budget that topped \$950,000 last year. It is a financier and leading force for a band of [29 water districts](#) that spent at least another \$270,000 on lobbying last year.

Its nine directors and their relatives gave at least \$430,000 to federal candidates and the Republican Party in the last two election cycles, and the farmers' political action committee gave more than \$315,000 more.

Aggressive, creative and litigious — minutes of a board meeting this year cited 11 continuing or anticipated lawsuits — the district has made enemies of environmentalists, rival politicians and other farmers whose water it has tried to appropriate. But it has also repeatedly made deals and won legislative favors to keep water flowing to itself and to farms across the [San Joaquin Valley](#), California's agricultural heartland.



California's snowpack testing on Wednesday was more encouraging than last year, but officials were far from certain that the drought was ending. And the prolonged drought has laid bare the patchwork way water is parceled out.

Farmers here have become a target not just of city dwellers forced by conservation decrees to shorten showers and let their lawns go brown, but also of other farmers. In the Sacramento-San Joaquin River

Delta in Northern California this year, growers grudgingly cut production to free up water for Central Valley farms, driven less by charity than by fear that the state would demand even more water if they did not.

But while California's farmers could conserve more — fewer than half use low-flow irrigation methods — the reality is more complex. Agriculture makes up just 2.2 percent of California's economy, but this area remains the nation's green grocer, and farming is still the economic lifeblood of the state's arid center. Both locally and nationally, farmers pack a political punch well above their weight.

"The federal government's involvement in water is more influenced by what goes on with Westlands than any other single entity," said Daniel P. Beard, who was the commissioner of the [Interior Department's Bureau of Reclamation](#) — the agency overseeing Western water — under President Bill Clinton. "They're not wrapped around the axle on politics or ideology; they're pragmatists. What they want is water, a continuation of the flow of money from agricultural programs, and more water."

And for good reason. Since 2005, on average, Westlands farms have annually sopped up one and a half times as much water as all of Los Angeles, most of it — some years, almost all of it — from federal deliveries. The water, largely siphoned from the [Sacramento River Basin](#) in Northern California, fuels a prodigious harvest, reported to be [more than \\$1.5 billion last year](#): almonds for export; tomatoes for paste and sauce; wine grapes; cotton; produce sold under labels like Heinz and Dole.

But as drought's grip tightened, the Sacramento River Basin's reservoirs ebbed and the district's federal Central Valley Project water allotment dwindled to zero for the last two years. Farmers have turned to aquifers, pumping so much groundwater that in some places, desiccated fields have [collapsed like fallen soufflés](#).

In turn, Westlands has redoubled efforts to increase its share of federal water. It wants new and bigger reservoirs to bolster Central Valley Project reserves. It is backing a much-disputed plan by Gov. Jerry Brown to [bore two 35-mile tunnels](#) that would shunt Sacramento River water directly to San Joaquin Valley farms.

But most of all, perhaps, it is seeking to persuade Congress to loosen the federal rules that now set aside Sacramento basin water for salmon fisheries and endangered species like the delta smelt. It is a cause that El Agua, the lobby group propped up by the district, has [endorsed with enthusiasm](#). Thwarted this year, the water district will be battling over the same issue when Congress returns next year.

Photo



Fishing in the San Luis Reservoir in the Central Valley, which stores water from the Sacramento-San Joaquin River Delta. Credit Damon Winter/The New York Times

Westlands officials say the [allocations have cut deeply into their allotments](#) of Central Valley Project water. And shortages, they say, are an existential threat to both their farms and the nation. The Central Valley hosts 1 percent of American farmland, but more than 15 percent of all irrigated fields — and it [grows a quarter of the nation's food](#).

“We’ve been feeding people with this food for generations,” said Shawn Coburn, 47, whose 1,200-acre farm here in Five Points is scarred with fields that lie fallow for lack of water. “You want to pay more for food? Or you want all your food from China? Fine. Don’t come complaining to me.”

Critics call that a smokescreen. The farmers’ real goal, they say, is to find the cheapest water possible — and Central Valley Project water, taxpayer-subsidized, [is far cheaper](#) than water bought on the open market, much less the water sold to homes and industries.

“They have an amazing amount of money to spend, and yet they plead hardship,” said Patricia Schifferle, a Truckee, Calif., environmental consultant who is perhaps Westlands’ most dogged critic. “We’re all paying for this largess that goes to the select few.”

Westlands’ size and its broad influence make it a prime target for detractors like Ms. Schifferle. The district calls the attacks unfair, and says that its clout is overrated. “It’s easy to pick on Westlands, because Westlands is big,” the district’s deputy general manager, Johnny Amaral, said in an interview. But Westlands’ principal water source — the Central Valley Project — has been cut off for two straight years, he noted, despite its best efforts.

“I don’t know anybody who wouldn’t work for their share in the same situation,” he said.

The Battle for Water

Twenty dams big and 500 miles of canals long, the Central Valley Project offered area farmers a boundless supply of Northern California water for decades. But as a second canal system, the State Water Project, began tapping the same northern rivers in the 1970s, problems emerged.

Commercial salmon fisheries collapsed. West of San Francisco, where the Sacramento and San Joaquin Rivers unite in an estuary, striped bass, sturgeon, shad and smelt began precipitous declines.

Congress's solution — a 1992 law reserving at least a minimum amount of water for wildlife — touched off a long-running political backlash by San Joaquin Valley farmers. For 23 years, Westlands has led the mostly losing battle to get that water back: in courts, in Washington and along California roads, where placards condemning a "Congress-created Dust Bowl" blame the government, not drought, for water shortages.

The district comes to the fight well prepared. Mr. Amaral was until this fall the top aide to Representative Devin Nunes of nearby Fresno, a Republican. Mr. Amaral's predecessor, Jason Peltier, oversaw Western water issues in the Interior Department under President George W. Bush.

Westlands' pre-eminent lobbyist, David Bernhardt, was the Bush Interior Department's solicitor before joining a Denver law firm that Westlands retained after President Obama was elected in 2008.

Others have also helped Westlands court federal decision makers. Vin Weber and Denny Rehberg, former Republican representatives from Minnesota and Montana, have been paid more than \$550,000 since 2013 to lobby Congress.

Photo



A large canal that leads to one of several pumping stations on McDonald Island in the Sacramento-San Joaquin River Delta. CreditDamon Winter/The New York TimesPhoto



The California Aqueduct, near the San Luis Reservoir, carries water from the Sacramento River Basin. Credit Damon Winter/The New York Times

At least \$530,000 more was spent from 2009 to 2013 for lobbying on endangered-species issues by Julie A. MacDonald, formerly Mr. Peltier's assistant at the Interior Department. Ms. MacDonald resigned that post in 2007; an internal inquiry later concluded that she had improperly disclosed information about Endangered Species Act deliberations to critics of the law. Ms. MacDonald, who has denied wrongdoing, was not charged with any legal violation.

The farmers' political action committee and the Westlands board have given generously to the campaigns of friendly federal legislators, contributing at least \$120,000 to Central Valley House members in the 2014 election. But one of the district's most notable contributions was made decades ago, not long after Congress's allotment of water for wildlife set off a backlash from farmers. In 1994, Westlands' thoroughly Republican leaders spurned their party's best hope for the Senate, and instead held a fund-raiser for the first-term Democratic incumbent, [Dianne Feinstein](#).

Ms. Feinstein has a strong environmental record. Yet she has also labored repeatedly to secure water for California agriculture, and especially for Westlands farmers. For the last two years, Ms. Feinstein has led the effort to push federal drought legislation through the Senate. And perhaps never has the tug-of-war between those competing priorities been so visible.

As federal water supplies to California farmlands dried up in 2014, the Republican-dominated House of Representatives — where Kevin McCarthy, from a San Joaquin Valley district adjacent to Westlands farmland, is the majority leader — swiftly passed a bill to undo environmental restrictions on greater transfers of Northern California water to farmers.

Ms. Feinstein [told the bill's California backers](#) that suspending environmental protections was both a political and a scientific mistake. Her own legislative effort, crafted in secrecy that year, nevertheless

sought to ship more northern water to Southern California farmers and cities while still hewing to the letter — although, critics argue, not always the spirit — of the environmental safeguards.

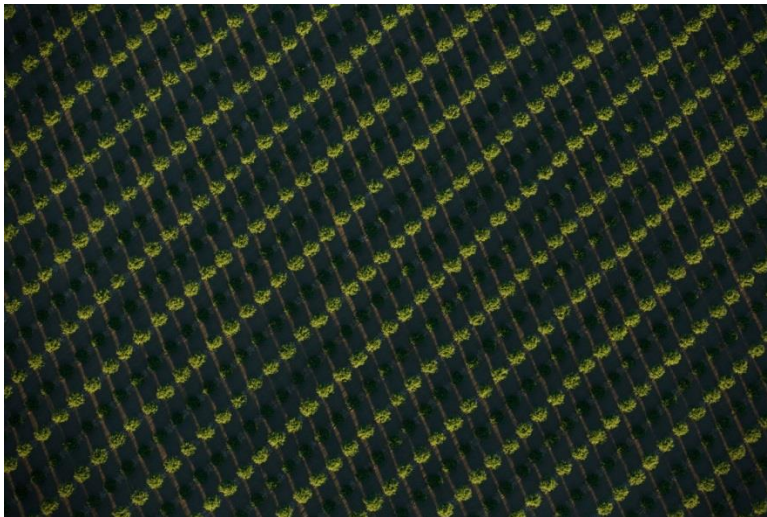
The most influential farm voice in that process was Westlands, represented by its lobbyist, Mr. Bernhardt, and by its general manager and top executive, Thomas W. Birmingham.

The confidential draft Ms. Feinstein's staff produced that fall offered something for everyone: calls for new and bigger dams, money for water conservation projects and tweaks to existing rules that would send more northern water to southern farms.

That autumn, as Ms. Feinstein's staff raced to strike a compromise with House negotiators, portions of the secret draft were leaked. Northern California politicians and environmentalists erupted in outrage over the bill's attempts to wring more water out of northern rivers, and in November 2014, Ms. Feinstein [scotched the effort](#).

She tried again this year, with a drought bill that restored some environmental protections for endangered species to assuage fellow Democrats and Northern Californians. But that collapsed in an acrimonious confrontation this month with Republicans in the House, who wanted those safeguards relaxed.

Photo



Almond trees in the district. Once in the ground, tree crops need water each day. Credit Damon Winter/The New York Times

Ms. Feinstein has promised to try again in 2016. But with Republicans in control of both houses of Congress, no drought legislation is likely to pass without help from Senator Lisa Murkowski, Republican of Alaska.

Ms. Murkowski, who leads both the Energy and Natural Resources Committee and the Appropriations subcommittee on the environment, visited Fresno in April to see the drought's impact. She also paused to raise \$100,000 in political donations [at a lunch with farmers](#) from Westlands and surrounding areas.

George Miller, a former Democratic representative from Northern California, sponsored the 1992 law that mandated a minimum amount of water for the region's fish. He was Westlands' fiercest adversary in Congress before retiring last year.

"You've got to give them an 'A' for effort," he said in an interview. "These boys are committed. They play at the highest level, and they never sleep — ever."

But Westlands farmers are unapologetic. Mr. Coburn, the Five Points farmer, not only says that effort is necessary, but he also plays his part in it as an unofficial ambassador to journalists and policy makers. "Big Ag polls poorly, family farms poll well," he said. "Nobody wants to hate on Shawn the farmer."

Two of Mr. Coburn's main crops — almonds and pistachios — also [occupy a third of Westlands' fields](#), up from a fifth in 2010. The reason is not that Americans would starve without them — many if not most are exported — but that they are extremely profitable compared with other crops.

Since California's drought began in 2012, the district's farmers have [added more than 18,000 acres of nut groves](#) that require constant watering, displacing crops like onions and tomatoes that can be fallowed when water is short.

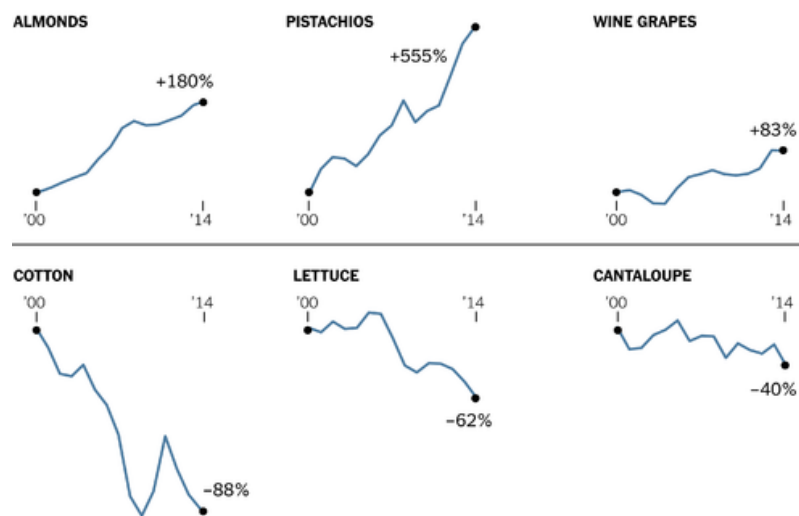
[Continue reading the main story](#)

GRAPHIC

[A Shift Toward Luxury Crops](#)

[Luxury crops are replacing staples on some California farms.](#)

Change in acres of crops harvested in the Westlands Water District since 2000



[OPEN GRAPHIC](#)

Some farmers, as well as California residents who blame farming for the state's water woes, shake their heads at that. Westlands farmers note that their fields are among the most water efficient anywhere.

"We just have to stay in line until we get someone in the White House who is going to listen to us," Mr. Coburn said. "This is about politics, not rain."

Bargaining With Regulators

Indeed, even as efforts to cajole more water from Congress stalled this autumn, Westlands's managers and their lawyers were sealing a very different bargain with water regulators at the Interior Department.

Westlands's first farmers won Congress's blessing to tap the Central Valley Project, knowing that their fields had a flaw: Beneath them, a layer of clay kept water from draining away. Irrigating the fields would release salts and toxic elements like selenium and boron — which, trapped in the soil, would eventually turn the ground barren.

The 1960 law that extended federal water to Westlands included a solution: a 188-mile canal, built by the government and later to be paid for by Westlands, to carry the irrigation runoff away. But in the early 1980s, local opponents stopped the ditch at mile 85 amid a federal wildlife refuge, where selenium-laden irrigation runoff quickly wiped out birds and fish.

Since then, Westlands and the Bureau of Reclamation have battled over how to handle the toxic runoff. The safest and most cost-effective fix, buying and fallowing fully half of the Westlands fields, was rejected. But the remaining options, which would fallow less land and build [desalination](#) plants to purify the runoff, would cost billions — more than Westlands or the Bureau of Reclamation could afford or were willing to pay.

In September, the two sides settled their three-decade dispute. But the agreement has only spawned more contention among supporters and critics of Westlands.

Under the accord, Westlands frees the government of its obligation in the 1960 law to provide drainage, promising to solve the problem on its own. In return, the \$350 million debt Westlands still owes for the infrastructure that delivered federal water would be written off. Its 25-year contract for a share of Northern California river water would be made permanent, and its rate would become among the lowest available.

The negotiations took years. Three months after Mr. Obama took office, Westlands made a tactical switch, paying Tony Coelho, a former representative from California, to advise on the negotiations. Mr. Coelho, one of the most powerful Democrats in Congress in the 1980s, once represented the district that included Westlands and the wildlife refuge that was devastated by selenium pollution.

He said that the notion of Westlands as a bully, flattening Northern Californians in its thirst for water, was a canard.

Photo



A footprint in the mineral-crusted, dried banks of the San Luis Reservoir. CreditDamon Winter/The New York TimesPhoto



A tractor kicked up dust in a field in the district, which is in California's Central Valley. CreditDamon Winter/The New York Times

"It takes two sides to have a fight," he said in an interview. "The people in the Bay Area haven't been pansies. They're more effective, I would say, than Westlands in preventing Westlands from doing things, and as a result, a lot of people are going out of business because water hasn't been there."

That is not a universal view.

"Every study I've seen, farmers make more money when there's drought than when there isn't," said Mr. Beard, the Bureau of Reclamation director under President Clinton. "I wouldn't be at all surprised if they end up on the top of the heap again."

An Expensive Campaign

The environmental curbs that San Joaquin Valley farmers blame for their water shortages might have been lifted by state and federal legislators years ago, but for one hitch: [Californians appear to support them](#).

In early 2013, Westlands placed a million-dollar bet that it could change that calculus.

That March, a retired Mexican diplomat, Martha Elvia Rosas, held a news conference in Fresno to introduce a new group, El Agua Es Asunto de Todos — an effort, she said, to give Latinos a louder voice in the debate over drought.

Ms. Rosas promised a campaign on Spanish-language radio, television, social media and in newspapers to show Latinos how important water was to their future.

And she played commercials that would soon blanket Spanish-language media: ordinary Latinos in cars and on doorsteps, delivering a simple message: “Sin agua, sin trabajo.” No water, no work.

[An account of the announcement](#) stated that El Agua was financed by donations from Ms. Rosas’ friends, family and local community leaders. But Westlands records show that the group emerged from a \$915,000 contract between the water district and a Manhattan political campaign firm, the [Fenenbock Group](#). A [Los Angeles casting agency](#) takes credit on its website for providing the Latinos in the commercials. The social media campaign and other emblems of support, from El Agua posters and stickers to El Agua hand fans, were produced by [a New York creative agency](#). The [San Francisco studio](#) that produced the commercials states that the campaign’s aim is to “generate voter action” in the face of Northern Californians’ efforts to cut off farm water supplies.

Mr. Amaral, Westlands’s deputy general manager, denied that, calling El Agua “purely an educational initiative.” As a quasi-governmental agency, he said, Westlands is barred from promoting political initiatives.

Photo



Cows grazing in parched hills along Interstate 5 in the Central Valley. Credit Damon Winter/The New York Times

Michael Fenenbock, the architect of the campaign, said it had vaulted water from a nonissue among California Latinos to a top concern. Moreover, he said, many Latinos now see environmental regulations as the cause of water shortages, and farmers as sympathetic figures.

“It’s been explosive,” Mr. Fenenbock said, adding that many Latinos now “very strongly support what we think is the centerpiece of the debate: a reliable water supply that is very much on the side of agriculture.”

The Fenenbock Group has spent \$700,000 on ads this year and could spend \$3 million in 2016 as election-year interest in water heats up, said Daphne Weisbart, the firm’s chief executive and Mr. Fenenbock’s wife. Westlands financed most of the group’s operations in 2013, but Ms. Weisbart said that a number of agricultural water districts now pay for the ads.

Westlands’s financial records indicate that it has paid nearly \$250,000 since 2014 to [a consulting company](#) run by Ms. Rosas, and Westlands continues to pay virtually all of El Agua’s \$14,000-a-month operating budget, Ms. Rosas said.

Ms. Rosas insisted that Westlands received nothing in return.

“They do not dictate what we say,” Ms. Rosas said. “We have made it clear from the start that we are in charge of this. This is our project, they are not in control.”

But Mr. Fenenbock said he was contemplating forming an El Agua political arm. Its contributions would carry weight with politicians, he said, because among many California Latinos, what El Agua says about water is taken as the truth.

“The brand,” he said, “is golden.”

http://mobile.nytimes.com/2015/12/31/us/farmers-try-political-force-to-twist-open-californias-taps.html?_r=1&referrer=https://www.google.com/

From: Johnny Amaral

Sent: Wednesday, February 10, 2016 9:40 AM

To: 'Steve Chedester'; Dan Vink; jason.peltier@sldmwa.org; Jason R. Phillips; 'Joe Raeder'; 'Nancy E Williams'; Ara Azhderian; dorth@davidorthconsulting.com; 'Walthall, Brent'; Tom Birmingham; David Bernhardt; Dennis Cardoza; Denny Rehberg; Jeff Sutton

Subject: The attached document was just transmitted to John Watts

Attachments: FINAL Senate bill intro joint statement JA.DOCX



SOUTH VALLEY WATER ASSOCIATION



PRESS RELEASE

February 10, 2016

For Immediate Release

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Jeff Sutton, Tehama-Colusa Canal Authority
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WATER AGENCIES ENCOURAGED BY INTRODUCTION OF SENATE WATER BILL

In response to today's introduction the California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act, several public water agencies from the Central Valley issued the following statement:

"In the last three years, several bills related to operations of the Central Valley Project and the California State Water Project have been introduced and passed in the House of Representatives and the Senate. Despite the best efforts by some in Congress, none of the legislation has been enacted, and the people of California who rely on the state's two major water projects continue to suffer unnecessarily from chronic water supply shortages.

Provisions of the California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act introduced by Senator Dianne Feinstein have merit, and its introduction is a positive step in the effort to find reasonable solutions to California's short-term and long-term water issues. The legislation advances efforts to provide common sense Congressional direction on the application of the Endangered Species Act to the operations of the CVP and SWP and a roadmap for development of new water supplies to meet the water supply needs in California and other regions of the west.

Passage by the Senate of this legislation will be an important step toward development and enactment of final compromise legislation to address this critical issue, and we support Senator Feinstein's efforts to obtain quick Senate approval.

Winter storms are beginning to fill northern reservoirs and produce runoff that must be captured if we are to end California's historic drought for the 25 million people dependent upon pumping in the Delta. Unfortunately, without meaningful legislation enacted into law, the people of California are likely to endure an uncertain winter season of floods, property damage, and storm water flowing out to the ocean, followed by a summer of drought—a scenario both frustrating and unacceptable. The time to act is now.”

###

From: Steve Chedester

Sent: Wednesday, February 10, 2016 9:48 AM

To: Johnny Amaral

CC: Dan Vink; jason.peltier@sldmwa.org; Jason R. Phillips; Joe Raeder; Nancy E Williams; Ara Azhderian; dorth@davidorthconsulting.com; Walthall, Brent; Tom Birmingham; David Bernhardt; Dennis Cardoza; Denny Rehberg; Jeff Sutton

Subject: Re: The attached document was just transmitted to John Watts

Looks ok

Steve Chedester

SJRECWA

Sent from iPhone

On Feb 10, 2016, at 8:40 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

<FINAL Senate bill intro joint statement JA.DOCX>

From: South Valley

Sent: Wednesday, February 10, 2016 10:54 AM

To: Steve Chedester

CC: Johnny Amaral; jason.peltier@sldmwa.org; Jason R. Phillips; Joe Raeder; Nancy E Williams; Ara Azhderian; dorth@davidorthconsulting.com; Walthall, Brent; Tom Birmingham; David Bernhardt; Dennis Cardoza; Denny Rehberg; Jeff Sutton

Subject: Re: The attached document was just transmitted to John Watts

Looks good. Thanks Johnny

Dan

Sent from iPhone so excuse errors

On Feb 10, 2016, at 11:48, Steve Chedester <stevechedester@sjrecwa.net> wrote:

Looks ok
Steve Chedester
SJRECWA
Sent from iPhone

On Feb 10, 2016, at 8:40 AM, Johnny Amaral <jamaryl@westlandswater.org> wrote:

<FINAL Senate bill intro joint statement JA.DOCX>

From: Jeff Sutton

Sent: Wednesday, February 10, 2016 11:27 AM

To: 'Johnny Amaral'; 'Steve Chedester'; 'Dan Vink'; jason.peltier@sldmwa.org; 'Jason R. Phillips'; 'Joe Raeder'; 'Nancy E Williams'; 'Ara Azhderian'; dorth@davidorthconsulting.com; 'Walthall, Brent'; 'Tom Birmingham'; 'David Bernhardt'; 'Dennis Cardoza'; 'Denny Rehberg'

CC: mitchbutler@naturalresourceresults.com

Subject: RE: The attached document was just transmitted to John Watts

Looks good, thanks Johnny.

Jeffrey P. Sutton

General Manager

Tehama-Colusa Canal Authority

P.O. Box 1025

Willows, CA 95988

Phone: (530) 934-2125

Cell: (530) [REDACTED]-[REDACTED]

From: Johnny Amaral [mailto:jamaral@westlandswater.org]

Sent: Wednesday, February 10, 2016 8:40 AM

To: 'Steve Chedester'; Dan Vink; jason.peltier@sldmwa.org; Jason R. Phillips; 'Joe Raeder'; 'Nancy E Williams'; Ara Azhderian; dorth@davidorthconsulting.com; 'Walthall, Brent'; Tom Birmingham; David Bernhardt; Dennis Cardoza; Denny Rehberg; Jeff Sutton

Subject: The attached document was just transmitted to John Watts

From: Bernhardt, David L.
Sent: Thursday, February 11, 2016 9:53 AM
To: Johnny Amaral; Thomas W. (Tom) Birmingham Esq.; Smith, Ryan A.
Subject: Fwd: Feb 11, 2016 CVP Ops Update

FYI

From: Murillo, David [<mailto:dmurillo@usbr.gov>]
Sent: Thursday, February 11, 2016 11:34 AM
To: Kerr, Grant; Eastman, Kevin; Esquivel, Joaquin@CNRA; kyle_chapman@boxer.senate.gov; anne_clement@boxer.senate.gov; Watts, John (Feinstein); James Peterson; Ferree, Logan; Miller, Ben; Burns, Emily; Durst, Garrett; Tudor, Chris; Specht, Brittan; Badmington, Casey; Victor, Kyle; Silvers, Jackie; Obermiller, Chad; Frison, Teresa; Arness, Patrick; Larrabee, Jason; Arnold Marr, Betsy; DeGraff, Kenneth; Amador, Adela; Edmonson, Robert; Goldstein, Miriam; Warren, Samantha; Petersen, Scott; Werwa, Eric; Murphy, Hannah; Ebner, Angela; Phillips, Troy; Nelson, Damon; Lombardi, Kyle; Crafton, Eliot; Orosco, David; Fundakowski, Jean; Wolcott, Kirk; Franco, Miguel; Wolman, Lauren; Weinstein, Sarah; Sheehy, Joe; Lachman, Andrew; Hurley, Amanda; Kiedrowicz, Melissa; Sanchez, Jeff; Castillo, Victor; Steinberger, Julia; Foley, Ian; Sengstock, Kathleen; Saroff, Laurie; Helfrich, Devin; Vanderslice, Jeff; Grimm, Tyler; Allen, Aaron; Steuer, Lee; Weaver, Kiel; Kearney, Christopher (Energy); David Brooks; Muirragui, Matthew; Betsy Cody; Sunny Snyder; Megan Kelhart; Jeremy Bratt; Dionne Thompson; Jeffrey Rieker; Bauserman, Trent; Camille (Calimlim) Touton; Wheeler Mathews, Katie; Mathew Maucieri; Shane Hunt; PABLO ARROYAVE; Ken Rooney; Stansbury, Melanie; [Alesandra Najera@boxer.senate.gov](mailto:Alesandra_Najera@boxer.senate.gov); White, Chris; Struthers, Emllyn; Mehrabi, Emma; Ginsburg, Andrew; Beck, Paul; Desai, Sonali; Jankiewicz, Joe; Cornell, Becky; Montiel, Johanna; Rotert, Blair; Sachs, Adam; Viall, Claire; Wissmann, Yvette; Rubalcava, Lorenzo; Carlton, Tim; Jaski, KC; Weiner, Matt; Ann Adler; Christina Durham - NOAA Federal; Alyssa Hausman; Sebring, Meridith; Itnyre, Tim; Chong, Laurie; Dunklin, Kristina; Michelle Banonis; Alicia Forsythe
Subject: Feb 11, 2016 CVP Ops Update

To all, on February 10, 2016 the CVP/SWP submitted the following proposed operations:

"10 Feb OMR index = -4,000 cfs

11 Feb OMR index = -4,500 cfs

12 Feb OMR index = -5,000 cfs

If the turbidity lingers in a concerning way, we would slow this ramping schedule.

Our request today is to have the ability to operate up to the -5,000 cfs OMR and self-police down and back up as conditions allow."

On February 10, 2016 a FWS Determination was transmitted to the Bureau that read:

"We find under Action 2 of the Reasonable and Prudent Alternative of the opinion that the 14-day average OMR should not be more negative than -5000 cfs.

We will work with you to closely monitor the situation over the coming days and make adjustments if needed. Using the process for making determinations, we will review conditions on Tuesday, February 16, 2016, accommodating the Monday holiday.

If you have questions please contact me.

Thanks

David G. Murillo
Bureau Of Reclamation
Mid Pacific Regional Director
Office # 916-978-5000

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From: Bernhardt, David L.
Sent: Friday, February 12, 2016 4:03 PM
To: Thomas W. (Tom) Birmingham Esq.; Johnny Amaral
Subject: Fwd: Hearing Notice -- Sub on WPO Ov Hrg 02.24.16
Attachments: image001.png; ATT00001.htm; image002.jpg; ATT00002.htm; image003.jpg; ATT00003.htm; image004.jpg; ATT00004.htm; Hearing Notice -- Ov hrg 02.24.16.pdf; ATT00005.htm; Sub on WPO Ov Hrg.ics; ATT00006.htm

David Bernhardt

Begin forwarded message:

From: "Weaver, Kiel" <Kiel.Weaver@mail.house.gov>
Date: February 12, 2016 at 5:52:58 PM EST
To: David Bernhardt <dbernhardt@bhfs.com>
Subject: FW: Hearing Notice -- Sub on WPO Ov Hrg 02.24.16

From: Varnasidis, Sophia
Sent: Friday, February 12, 2016 4:20 PM
To: Natural Resources Repubs WPO LAs; Natural Resources Repub WPO Schedulers; Natural Resources Dems WPO LAs; Natural Resources Dem WPO Schedulers; Natural Resources Republican Press; Hall, Dan; Taft, Tammy; Cox, William; Johnson, Edward; Digest, Committee
Cc: All Staff - Natural Resources Cmte
Subject: Hearing Notice -- Sub on WPO Ov Hrg 02.24.16

February 12, 2016

★ ★ ★ HEARING NOTICE ★ ★ ★

MEMORANDUM

To: Members, Subcommittee on Water, Power and Oceans
From: The Honorable John Fleming, Chairman
Subject: Oversight Hearing – February 24, 2016

On Wednesday, February 24, 2016, at 10:00 a.m., in room 1324 Longworth House Office Building, the Subcommittee on Water, Power and Oceans will hold an oversight hearing titled, *"The*

2016 California Water Supply Outlook During the El Niño and Three Years of Restricted Water Deliveries."

Witnesses are by invitation only.

If you need further information, please contact Kiel Weaver, Staff Director or Alex Semanko, Clerk, with the Subcommittee on Water, Power and Oceans at (202) 225-8331.

Sophia A. Varnasidis

Deputy Director of Operations

Committee on Natural Resources

1324 Longworth House Office Building

Washington, DC 20515

(202) 225-2761 *main*

(202) 225-8182 *direct*

(202) 225-5929 *fax*

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February 12, 2016

★ ★ ★ HEARING NOTICE ★ ★ ★

MEMORANDUM

To: Members, Subcommittee on Water, Power and Oceans
From: The Honorable John Fleming, Chairman
Subject: Oversight Hearing – February 24, 2016

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Witnesses are by invitation only.

If you need further information, please contact Kiel Weaver, Staff Director or Alex Semanko, Clerk, with the Subcommittee on Water, Power and Oceans at (202) 225-8331.

The use of cellular telephones is prohibited on the Committee dais or in the Committee hearing rooms during the meeting of the Committee pursuant to Rule 3(m) of the Committee Rules. Accommodations for individuals with disabilities, including assistive listening systems, interpreters, and materials in alternate formats, may be arranged by contacting the Committee in advance of the scheduled event (4 business days notice is requested) at voice (202) 225-2761; fax (202) 225-5929; online at <http://naturalresources.house.gov/contact/>; or at 1324 Longworth House Office Building (HOB), Washington, D.C. 20515-6201.

From: Johnny Amaral
Sent: Thursday, February 18, 2016 4:46 PM
To: David Bernhardt
Subject: Dinner on monday

Do you have somebody at Brownstein that can find us a restaurant for Monday night? Party of eight for 7 PM. One of our directors is coming to DC with us. The new director named William Bordeaux.

Best,

Johnny Amaral

From: Johnny Amaral
Sent: Thursday, February 18, 2016 5:02 PM
To: Ahmadi, Shaeda (Feinstein)
CC: Duck, Jennifer (Feinstein); Radford, Jackie (Feinstein); Watts, John (Feinstein)
Subject: Re: Next week

Yes. We will be there. So you are aware, we will have one of our consultants (David Bernhardt) with us as well as one of our board members (William Bordeau)

Thanks for the response.

See you soon.

Best,

Johnny Amaral

On Feb 18, 2016, at 3:57 PM, Ahmadi, Shaeda (Feinstein) <Shaeda_Ahmadi@feinstein.senate.gov> wrote:

Johnny—are you and Tom free to come in on Tuesday, February 23 at 5:00pm?

Thanks,
Shaeda
Shaeda L. Ahmadi
Scheduler
Office of U.S. Senator Dianne Feinstein
202.224.3841



<image003.jpg>

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Thursday, February 18, 2016 4:09 PM
To: Watts, John (Feinstein) <John_Watts@feinstein.senate.gov>
Cc: Duck, Jennifer (Feinstein) <Jennifer_Duck@feinstein.senate.gov>
Subject: Next week

John,

Tom and I will be in town next week ([February 23-25](#)) and we're hoping to schedule a meeting with you (and the Senator if she's available). We will be making the rounds to visit the usual suspects on the House side and to the extent that we can help or be a conduit for info, we'd be glad to. We are open for most of the day on Tuesday, [Wednesday afternoon](#), and [Thursday morning](#).

Can we make something work?

Best,

Johnny Amaral

From: Johnny Amaral

Sent: Thursday, February 18, 2016 6:12 PM

To: David Bernhardt; Dennis Cardoza; Denny Rehberg; Ryan A. ' 'Smith; Catherine Karen; Tom Birmingham; Ed Manning; Carolyn Jensen; Mike Burns

Subject: Friday call

Ladies and gentlemen,

I will be at the airport early tomorrow morning heading back to California and thus will not be able to be on the 7 AM nor the 7:30 AM calls.

If I get through security in time I will do my best to call in.

Also, since I will be flying to DC on Monday morning we won't be doing a Monday morning call either.

Best,

Johnny Amaral

From: Carolyn Jensen
Sent: Thursday, February 18, 2016 6:16 PM
To: 'Johnny Amaral'
Subject: RE: Friday call

Safe travels!

-----Original Message-----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]

Sent: Thursday, February 18, 2016 5:12 PM

To: David Bernhardt; Dennis Cardoza; Denny Rehberg; Ryan A. 'Smith; Catherine Karen; Tom Birmingham; Ed Manning; Carolyn Jensen; Michael Burns

Subject: Friday call

Ladies and gentlemen,

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If I get through security in time I will do my best to call in.

Also, since I will be flying to DC on Monday morning we won't be doing a Monday morning call either.

Best,

Johnny Amaral

From: Bernhardt, David L.
Sent: Thursday, February 18, 2016 6:44 PM
To: Johnny Amaral
CC: Smith, Ryan A.; Noles, Holly A.
Subject: Re: Dinner on monday

Yes. Well get it set up.

David Bernhardt

> On Feb 18, 2016, at 6:45 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:
>
>
> Do you have somebody at Brownstein that can find us a restaurant for Monday night? Party of eight for 7 PM. One of our directors
is coming to DC with us. The new director named William Bordeau.
>
> Best,
>
> Johnny Amaral
>
>

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From: Weaver, Kiel

Sent: Friday, February 19, 2016 10:19 AM

To: David Bernhardt; Johnny Amaral; Birmingham, Thomas (tbirmingham@westlandswater.org)

Subject: democrat witness for next week's hearing....

Richard Pool

President and Owner Pro-Troll Fishing Products

Email rbpool@protroll.com (this email may currently be down)

Backup email action@water4fish.org

Phone (925) [REDACTED] - [REDACTED]

Mailing Address

Pro-Troll Fishing Products

5700A Imhoff Drive

Concord, CA 94520

From: Johnny Amaral

Sent: Saturday, February 20, 2016 7:45 AM

To: Tom Birmingham; 'William Bourdeau'; David Bernhardt; Denny Rehberg; Catherine Karen; Dennis Cardoza; 'Smith, Ryan A.'

Subject: Itinerary

Attachments: Washington DC Itinerary TB, WB, JA.docx

Team,

Attached is the schedule so far. There are still a couple of meeting requests pending, and we're currently open on Wednesday after the hearing for lunch. If we have a high value target that would be willing to join us for lunch that day that's not on the pending request list, please let me know (media, member, staff, allied advocates?)

One potential change is with the Monday morning coffee meetings. We may end up having to switch Carolyn Lochhead to Tuesday and Mike Doyle to Wednesday.

Washington DC Itinerary, Westlands Water District

February 22-25, 2016

Tom Birmingham, William Bordeau, and Johnny Amaral

MONDAY

7:00 pm - Team dinner at Oceanaire - 1201 F Street, NW
202-347-2277

TUESDAY

8:00 am - Coffee with Mike Doyle (Fresno Bee), Capitol Hilton

11:30 pm - Lunch with John Bezdek, Location TBD

1:30 pm - Meeting with House Majority Leader Kevin McCarthy and staff
H-107, Capitol

4:00 pm - Meeting with Chris Kearney and Colin Hayes – Senate Energy and Natural Resources Committee
304 Dirksen Senate Building
202-224-4971

5:00 pm - Meeting with Sen. Feinstein and staff (John Watts)
331 Hart Senate Office Building
202-224-3841

7:15 pm - Dinner with Rep. Costa, Acqua AI 2
212 7th Street SE

WEDNESDAY

- 8:00 am - Coffee with Carolyn Lochhead (SF Chronicle), Capitol Hilton
- 10:00 am - HEARING - RESOURCES SUBCOMMITTEE ON WATER, POWER, AND OCEANS
1324 Longworth House Office Building
- The 2016 California Water Supply Outlook During El Nino and Three Years of Restricted Water Deliveries
- 4:30 pm - Meeting with Rep. Denham and staff (Jason Larrabee)
- 1730 Longworth House Office Building
- 202.225.4540
- 7:00 pm - Dinner with Rep. Devin Nunes, Kiel Weaver, and staff (2)
- Del Friscos Double Eagle Steakhouse
- 950 I Street NW #501

THURSDAY

- 8:00 am - Breakfast with Tom Nassif (Western Growers Association), Location TBD
- 9:45 am - Meeting with Rep. Valadao and staff
- 1004 Longworth House Office Building
- 202-225-4695

PENDING requests

Rep. McClintock

Neil Chatterjee, Leader McConnell

From: Bernhardt, David L.
Sent: Monday, February 22, 2016 7:06 AM
To: Johnny Amaral; Thomas W. (Tom) Birmingham Esq.
Subject: Fwd: House committee takes up Calif. water supplies

FYI

Subject: House committee takes up Calif. water supplies

House committee takes up Calif. water supplies

Debra Kahn, E&E reporter

Published: Monday, February 22, 2016

A House Natural Resources subcommittee this week will delve into the latest water supply conditions in drought-parched California.

The Subcommittee on Water, Power and Oceans is holding a hearing Wednesday on the outlook for this year's water deliveries, in light of El Niño conditions that have slightly improved California's reservoir supplies.

California Republicans, including subcommittee members Reps. Tom McClintock, Doug LaMalfa and Jeff Denham, have been raising the alarm for the past several years about cuts in water deliveries to farms and cities from the state's main water hub, the Sacramento-San Joaquin River Delta.

Massive state and federal pumps in the delta bring snowmelt and rainfall from Northern California through the state's rich agricultural region in the center and population clusters in the south.

A series of bills to increase water deliveries have passed the House in previous years but have stalled in negotiations with the Senate.

Advertisement

House Republicans have so far been tepid in their reaction to Sen. Dianne Feinstein's (D-Calif.) latest bill, released earlier this month, to dictate operations on the water projects to maximize deliveries (***E&E Daily***, Feb. 12).

The Bureau of Reclamation, which operates the massive Central Valley Project water system, will likely make its first projection of 2016 deliveries by the end of the month. In 2015, for the second year in a row, it delivered no water to agricultural contractors.

Officials sounded a note of optimism last month, noting that snowpack content in the Sierra Nevada was higher than average, although reservoir storage was still far below normal.

"We are feeling encouraged," said David Murillo, the bureau's mid-Pacific regional director. "However, storage in our reservoirs remains low, and we must be prudent as we develop initial operation plans and allocations for CVP water contractors."

On Friday, one of the state's most influential water interests weighed in on the water supply situation, arguing that Endangered Species Act protections for fish in the delta have cut water deliveries far beyond reductions caused by the drought.

"[T]he last two years have been very dry, but the regulatory constraints imposed by the biological opinions have made the water supply crisis even worse," Johnny Amaral, deputy general manager of external affairs for the Westlands Water District, said in an email.

Westlands, which supplies Central Valley Project water to 600,000 acres of the San Joaquin Valley, is the largest agricultural water district in the country; Amaral is former chief of staff for Rep. Devin Nunes (R-Calif.).

"Despite the much needed rainfall and the snowpack, which in some regions has caused flooding and property damage, more than 504,000 acre-feet of water has been released out to the ocean ... uncaptured, unused, and

gone forever," Amaral wrote. "To put that into perspective ... that's more than ONE HUNDRED AND FIFTY BILLION GALLONS of water."

Schedule: The hearing is scheduled for Wednesday, Feb. 24, at 10 a.m. in 1324 Longworth.

Witnesses: Brett Barbre, board member of the Municipal Water District of Orange County; Thad Bettner, general manager of the Glenn-Colusa Irrigation District; Tom Birmingham, general manager of the Westlands Water District; David Murillo, director of the Bureau of Reclamation Mid-Pacific region; and Dick Pool, president of Pro-Troll Fishing Products.

Jon Hrobsky

Policy Director

Brownstein Hyatt Farber Schreck

Energy, Environment & Resource Strategies

202-872-5294 (Direct)

202-████-████ (Cell)

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From: Johnny Amaral
Sent: Tuesday, February 23, 2016 1:44 PM
To: Karen Clark
CC: Thomas Birmingham; Cheryl Hall; David Bernhardt
Subject: Re: Tom Nassif DC Breakfast, Thurs Feb. 25

Got it. We will be there. Tom, David Bernhardt, and I. Thanks

Best,

Johnny Amaral

On Feb 23, 2016, at 3:27 PM, Karen Clark <kclark@westlandswater.org> wrote:

Hi Johnny and Tom,

Please see the information below for your breakfast on Thursday, February 25. Let me know if you have any questions. Johnny, if you could reply to Cheryl and me so we know you received this information, we would appreciate it.

~Karen

Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) [REDACTED]
(f) 559.241.6277
Email: kclark@westlandswater.org

From: Cheryl Hall [<mailto:chall@WGA.com>]
Sent: Tuesday, February 23, 2016 12:25 PM
To: Karen Clark
Subject: FW: Tom Nassif DC Breakfast, Thurs Feb. 25

Karen-

The address for the breakfast on Thursday with Tom B., Tom Nassif, Dennis Nuxoll, and Ben Sacher from WG is below. Reservations are for 6 people so if Tom wants to invite 2 additional guests he is welcome to do so.

Will you be sure he gets this information?

Thanks!
Cheryl

From: Ben Sacher
Sent: Monday, February 22, 2016 3:28 PM
To: Cheryl Hall <chall@WGA.com>
Subject: Tom Nassif DC Breakfast, Thurs Feb. 25

Hi Cheryl,

We have a breakfast with Tom scheduled Thursday at 8 am at Poste, located at 558 8th St NW, next to the Hotel Monaco.

Thanks

Ben Sacher
Western Growers
1776 Eye Street NW, Suite 255
Washington, DC 20006
Cell: (202) [REDACTED] [REDACTED] Tel: (202) 296-0191 ext 7301
Email: bsacher@wga.com
Website: www.wga.com

From: Smith, Ryan A.
Sent: Tuesday, February 23, 2016 3:18 PM
To: jamaral@westlandswater.org
CC: Bernhardt, David L.
Subject: Is this what you are looking for?

Here are Huffman's quotes we have been able to find thus far:

Floor Speech December 2014

"And to make sure we are all dealing with the same facts, I want to remind my colleagues that the state and federal water export pumps in the Delta right now are operating at more than 5,000 cubic feet per second. The only reason they are not pumping even faster is not to protect fish and wildlife, not because of the Endangered Species Act, none of the other boogie men that we hear as a justification for this bill. No, the reason those pumps are not going even faster is because of standards set by the state of California to protect water quality for municipal, industrial and agricultural and other uses in the system. So the only way that this bill could deliver more water today – well there is no way it could deliver more water today – and the only way it could deliver more water in other times of the year is by taking it away from other water users and other beneficial uses in our state..."

<https://huffman.house.gov/media-center/press-releases/huffman-votes-against-house-republican-water-bill>

December 2015 - House Rules Committee Debate HR 5781

Congressman Jared Huffman (D-CA) added:

"There's a bit of a narrative that we're hearing that because it's raining today in California, water is wasting to the sea and that we need a bill like this so we can capture it in this critical drought. I just want to inject a few facts about that. The fact is that it is raining and that's good news, but the pumps in the Delta have increased, and they are now at the maximum level allowed under the water right permit for the state and federal projects. So truth is today in California, it's not the Endangered Species Act keeping the state and federal projects from pumping more; it is their permit and the salinity standards that are part and parcel of that water permit and it's important that people recognize that because this bill, even if passed, would not enable more pumping right now or in lots of other times in the state.

<http://mavensnotebook.com/2014/12/07/the-house-rules-committee-debates-hr-5781-the-california-emergency-drought-relief-act-of-2014/>

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From: Weaver, Kiel
Sent: Wednesday, February 24, 2016 2:05 PM
To: Birmingham, Thomas (tbirmingham@westlandswater.org); Johnny Amaral; David Bernhardt
Subject: FW: Flint Michigan of The San Joaquin Valley

Sound familiar?

From: Daniel, Elise
Sent: Wednesday, February 24, 2016 2:32 PM
To: Daniel, Elise
Subject: Flint Michigan of The San Joaquin Valley



FOR IMMEDIATE RELEASE
Wednesday, February 24, 2016

CONTACT: [Elise Daniel](#)
202-226-9019

Flint Michigan of The San Joaquin Valley
Government Failures Worsen Drought in the Face of El Niño

Washington, D.C. – Today, the Subcommittee on Water, Power,

and Oceans held a hearing to review federal regulations exacerbating California's drought crisis even while El Niño is providing significant precipitation for the region.

*"I've watched what's happening in [Flint, Michigan](#) and the outrage with the government action that put the population of Flint at risk," stated **Tom Birmingham, General Manager, Westlands Water District**. "Where's the outrage with governmental policies that have created zero water supplies for communities in the San Joaquin Valley?"*

Panelists highlighted the problem of water restrictions, intended to protect the Delta smelt fish, resulting in 162 billion gallons diverted this year to protect the fish. These policies have proven futile as the Delta smelt numbers continue to decline.

"It is beyond reasonable dispute that the continued, prolonged water supply shortages being suffered in the San Joaquin Valley are the result of policy choices made by the federal government, not by hydrologic conditions," **Birmingham added**. *"As a consequence, it is unlikely that the current El Niño conditions will produce any water supply benefits."*

The hearing highlighted the need for legislative solutions to increase water storage capacity, allowing reservoirs to capture water during the rainy season to help [mitigate future drought](#).

Rep. Tom McClintock (R-CA) questioned the panel about how much water could have been captured if the House-passed [Western Water and American Food Security Act](#) was signed into law. At least "200,000 acre feet of that water," serving "400,000 households of 4 people," **Birmingham responded**.

Rep. Doug LaMalfa (R-CA) [questioned](#) the panel about the modeling and fish mortality data Federal agencies are using. Answers revealed that agencies rely on flawed data to make water flow decisions that ultimately results in shortages to water users.

Rep. Jeff Dehman (R-CA) [reiterated](#) the harmful impact of drought to California's economy. *"This administration continues to talk about environmental and social justice. Where's the justice [in] 50% unemployment?"*



"Will a three-inch fish continue to be more important than people? So far, that answer is yes," **stated Subcommittee Chairman John Fleming (R-LA)** **stated.**

Click [here](#) to view the full witness testimony and [here](#) to learn more about the *Western Water and American Food Security Act*

###

From: Jason Peltier

Sent: Saturday, February 27, 2016 8:56 AM

To: Ara Azhderian; Dennis Cardoza; Johnny Amaral; David Bernhardt; T Birmingham

Subject: Grace

.S. Rep. Grace Napolitano recovering from stroke, will continue re-election campaign



Congresswoman Grace Napolitano speaks during the Stand Up 4 Transportation Summit presented by Foothill Transit at Cal Poly Pomona in Pomona on Thursday, April 9, 2015. Photo by Watchara Phomicinda/San Gabriel Valley Tribune/File

By [Stephanie K. Baer](#), LA Daily News

Posted: 02/26/16, 8:47 PM PST | Updated: 3 hrs ago

[0 Comments](#)



U.S. Rep. Grace F. Napolitano.

U.S. Rep. Grace Napolitano was wrapping up an endorsement meeting in Los Angeles earlier this month when she felt something was not right.

“I couldn’t get what I wanted to say out,” Napolitano said Friday morning, recalling the Feb. 13 interview with the Los Angeles County Young Democrats. “I had full consciousness — I just didn’t know what was wrong.”

She said she stuttered for a moment before formulating a word or two. Then the meeting ended and she stood up from her chair and walked out of the room.

Her staff drove her to Kaiser Permanente Downey Medical Center where doctors confirmed the congresswoman had suffered a stroke.

“It’s the first time I’ve ever had anything wrong with me,” Napolitano said. “I was on no medication, didn’t take anything, and now I’m on two medications for my stroke.”

Napolitano, 79, is seeking a 10th term in Congress this year and said that despite the health scare she is continuing her re-election campaign. She [faces fellow Democrat and state Assemblyman Roger Hernandez](#) of West Covina in the 32nd Congressional District race.

“My heart goes out to her and my prayers are with her and her family and I wish her a speedy recovery,” Hernandez said.

Napolitano said the only health warning she received was five years ago when a doctor told her she had high blood pressure. She refused medication but went on a diet and lost weight. She never noticed any problems since then, until now.

While staff said her doctors expect her to be back to work in a few weeks, Napolitano will miss this weekend’s California Democrats State Convention in San Jose where delegates are expected to endorse a candidate for the San Gabriel Valley seat.

“I had planned to be there and thought better of it,” she said, adding that she feels “fine,” but the doctor told her to rest at home for at least a month. “I’m going to follow the doctor’s orders.”

On Thursday, Napolitano’s campaign announced the unanimous support of her fellow California Democrats in the House — an endorsement that Hernandez said he was expecting.

“These are her colleagues in Congress,” he said. “This is a historical norm for members of Congress to stick together.”

Hernandez added that he was proud of the many endorsements he has received from local police unions, city council members and fellow state legislators.

“When you run to represent the community, you want to have the community supporting you,” Hernandez said. “In the district, they’re saying it loud and clear that they want a representative to get the job done.”

When asked if she had any concerns about her health moving forward, Napolitano said, impassioned, “not at all.”

“People have enough sense to realize this is something that comes and goes,” she said. “I may have to be on medication for the rest of my life, but it’s certainly not keeping me from doing my job.”

From: Jason Peltier
Sent: Monday, February 29, 2016 1:11 PM
To: Tom Birmingham; Johnny Amaral; Gayle Holman; Mike Wade; Dennis Cardoza; David Bernhardt; Philip Williams; Ed Manning; Carolyn Jensen
Subject: Fwd: Last week's California Water Supply Hearing
Attachments: TFG Memo on House Natural Resources Subcommittee on Water Power and Ocea....pdf; ATT00001.htm

Begin forwarded message:

From: Dan Keppen <dankeppen@charter.net>
Date: February 29, 2016 at 12:00:09 PM PST
To: Bill Kennedy <[REDACTED]@[REDACTED]> 'Chris Hurd' <[REDACTED]@[REDACTED]>
<[REDACTED]@[REDACTED]> 'Don Schwindt' <[REDACTED]@[REDACTED]> 'Harold Mohlman'
<[REDACTED]@[REDACTED]> 'Harvey Bailey' <[REDACTED]@[REDACTED]> Marc Thalacker
<[REDACTED]@[REDACTED]> 'Pat O'Toole' <[REDACTED]@[REDACTED]> 'Ron Rayner' <[REDACTED]@[REDACTED]>
'Sandy Denn' <[REDACTED]@[REDACTED]> 'Tom Schwarz' <[REDACTED]@[REDACTED]> April Snell
<aprils@owrc.org>, Bill Luce <wluce@friantwater.org>, 'Bill Plummer' <[REDACTED]@[REDACTED]> 'Brad
Wind' <bwind@ncwcd.org>, 'Bruce Whitehead' <brucew@southwesternwater.org>, 'Cary Keaten'
<ckeaten@sidwater.org>, Chanee Grant <cgrant@nmid.org>, 'Chris Udall'
<Chris@agribusinessarizona.org>, 'Chris Voight' <[REDACTED]@[REDACTED]> Clifford Searle
<cntsearle@pmt.org>, 'Clinton Pline' <[REDACTED]@[REDACTED]> Dale Swensen <[REDACTED]@[REDACTED]>
'Daren Coon' <DCoon@nmid.org>, 'Dave Solem' <dsolem@scbid.org>, 'David Mansfield'
<[REDACTED]@[REDACTED]> 'Don Kraus' <[REDACTED]@[REDACTED]> 'Gary Esslinger' <gesslinger@ebid-nm.org>,
'Gering Ft Laramie ID' <[REDACTED]@[REDACTED]> 'gering-ft laramie ID #2'
<[REDACTED]@[REDACTED]> 'Grant Ward' <grant@msidd.com>, 'Ivan Ray' <ivanr@davisweber.org>, 'James
Broderick' <jwb@secwcd.com>, Jason Peltier <jason.peltier@sldmwa.org>, Jason Phillips
<jphillips@friantwater.org>, 'Jeff Sutton' <jsutton@tccanal.com>, 'Joe Rutledge'
<joe.rutledge@tvid.org>, 'Ken Curtis' <[REDACTED]@[REDACTED]> 'Larry Bauman' <lbauman@cvpwater.org>,
'Larry Hicks' <lsrcd@yahoo.com>, 'Mark Atlas' <matlas@jmatlaslaw.com>, 'Matt Harris'
<[REDACTED]@[REDACTED]> "Matt Lukasiewicz" <[REDACTED]@[REDACTED]> Mike Britton
<mbrampton@northunitid.com>, 'Mike LaPlant' <[REDACTED]@[REDACTED]> 'Natasha Montgomery'
<nmontgomery@sidwater.org>, 'Norm Haak' <[REDACTED]@[REDACTED]> 'Norm Semanko' <norm@iwua.org>,
'North Platte Irrigators' <[REDACTED]@[REDACTED]> 'Pat Riley' <[REDACTED]@[REDACTED]> 'Paul Orme'
<[REDACTED]@[REDACTED]> 'Rebecca Davidson' <[REDACTED]@[REDACTED]> 'Richard Moss'
<RMoss@ppeng.com>, Rusty Jardine <rusty@tcid.org>, 'Sheldon Jones'
<sheldon@farmfoundation.org>, "Shields, Tina L" <tlshields@IID.com>, 'Steve Benson'
<swbenson@iid.com>, 'Tom Davis' <tdavis@ycwua.org>, Tom Knutson <[REDACTED]@[REDACTED]>
'Tom Myrum' <tmyrum@wswwa.org>, 'Wade Noble' <wade@noblelaw.com>
Cc: 'Gary Sawyers' <gws@bolenfransen.com>, 'Mark Limbaugh' <mlimbaugh@tfgnet.com>, 'Ara
Azhderian' <ara.azhderian@sldmwa.org>, 'Susan Ramos' <sramos@westlandswater.org>
Subject: Last week's California Water Supply Hearing

Dear Alliance Directors and Advisory Committee Members:

Attached is a brief summary – prepared by Mark Limbaugh and his associates at The Ferguson Group - of the California water supply oversight hearing in the House Natural Resources Water and Power Subcommittee held last week in Washington DC.

Please let me know if you have any questions.

Best regards –

Dan Keppen
Executive Director



1130 Connecticut Avenue, NW
Suite 300
Washington, D.C. 20036
202.331.8500
202.331.1598 fax

February 26, 2016

House Natural Resources Subcommittee on Water, Power and Oceans Hearing entitled “The 2016 California Water Supply Outlook During the El Niño and Three Years of Restricted Water Deliveries”

On February 24, 2016 the House Committee on Natural Resources Subcommittee on Water, Power and Oceans held an [oversight hearing](#) to focus on the continuing drought in California, its impacts state-wide and nationwide and ways Congress can help overcome it.

Witnesses

Brett Barbre

Director
Municipal Water District of Orange County
Yorba Linda, California

[Written Testimony](#)

Thad Bettner

General Manager
Glenn-Colusa Irrigation District
Willows, California

[Written Testimony](#)

Tom Birmingham

General Manager/General Counsel
Westlands Water District
Fresno, California

[Written Testimony](#)

David Murillo

Regional Director, Mid-Pacific Region
Bureau of Reclamation, U.S. Department of the Interior

[Written Testimony](#)

Richard Pool

President and Owner
Pro-Troll Fishing Products
Concord, California

[Written Testimony](#)

Summary

Subcommittee members who were present at the hearing included: Chairman John Fleming (R-LA), Ranking Member Jared Huffman (D-CA), and Reps. Tom McClintock (R-CA), Paul Gosar (R-AZ), Doug LaMalfa (R-CA), Jeff Denham (R-CA), Dan Newhouse (R-WA), Jim Costa (D-CA), and Alan Lowenthal (D-CA).

The hearing was the first one in 2016 dedicated exclusively to the issue of water supply in California. Witnesses at the hearing representing California water districts urged for Congressional relief from drought-related water restrictions, but Subcommittee members present at the hearing showed few signs of bridging a partisan divide that has recently stalled California drought-relief legislation introduced in the past year. Water district officials expressed their strong desire for relief from what they expect to be a third straight year of drought with no federal allocations.

Westlands Water District General Manager Tom Birmingham compared the drought-related water shortages affecting San Joaquin Valley communities to the drinking water contamination crisis in Flint, Michigan. “I’ve watched the outrage with the government action that put the population of Flint at risk, but where’s the outrage with government policies that have created zero water supplies for communities in the San Joaquin Valley?”

Thad Bettner, General Manager of the Glenn-Colusa Irrigation District, stated that the models federal officials use to determine needed water levels for fish are outmoded. He took aim at a recent federal report alleging that endangered salmon suffered a second straight disastrous year, with all but 3 percent of the latest generation dying in too-shallow, too-warm rivers. “Unfortunately this factoid has now become a bumper sticker of the current state of the winter run without much critical evaluation of the underlying data or science to support it. Improvements must be made in the monitoring locations and calculations to more accurately estimate fish survival rates, particularly if those estimates continue to impact how the (Central Valley Project) is operated to meet all project purposes.”

Subcommittee members showed little sign of wishing to work together in a bipartisan fashion to resolve the water crisis in California. Ranking Member Huffman said witnesses and Republican lawmakers who blamed protections of the endangered Delta smelt for causing the valley’s water shortages were engaging in election-year politics. “I hope someday we can hold hearings on real drought solutions.” Huffman’s comments prompted Rep. Denham, to accuse him of “arrogance” and disparaging the plight of largely Hispanic communities such as Porterville, CA which had to truck in water last year for public showers. “This administration continues to talk about environmental and social justice. Where’s the justice in 50 percent unemployment?”

Subcommittee Republicans stressed their push for legislative solutions to increase water storage capacity and allowing reservoirs to capture water during the rainy season to help mitigate future drought, including the “Western Water and American Food Security Act of 2015” ([H.R. 2898](#)), which the House passed in July 2015, but which the vast majority of Democrats opposed. Panelists also highlighted the problem of water restrictions intended to protect the Delta smelt, whose numbers are still in decline despite 162 billion gallons diverted in the past year to help the fish, they argued.

There was also a brief mention of Senator Dianne Feinstein’s (D-CA) recently introduced “California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act” ([S. 2533](#)), her third attempt at drought legislation, which proposes \$1.3 billion for storage and other

projects and which urges that decisions to pump water south of the Delta be based on “real-time monitoring information” about fish rather than set models. However, Bureau of Reclamation Mid-Pacific Region Director David Murillo acknowledged that S. 2533 would have no impact on pumping decisions this year.

Several Subcommittee members also expressed frustration at the fact that the Delta smelt still remains vulnerable, even after several years of zero federal water allocation for CVP farmers and communities south of the Delta. Murillo acknowledged that “the abundance of the Delta smelt is pretty low right now,” but that the federal government must continue to flush water from the Sacramento Delta in order to comply with the Endangered Species Act (ESA). “We’ve got to not only take a look at providing project [water] yield, we’ve also got to comply with the law,” Mr. Murillo said. “And the law says we’ve got to protect certain species, the Delta smelt and the winter-run salmon, and we’re doing that. And I know that people are disappointed with the operations.” Rep. McClintock responded by stating “So we’ve not only decimated our economy, we’ve not only done enormous harm to millions of people, but we haven’t accomplished the stated purpose of these laws, which was to improve the environment. In fact, I would say we’ve actually harmed the environment.”

Ranking Member Huffman pushed back on Rep. McClintock’s comments by stating “We’re here to wage another ideological battle against the Endangered Species Act, against the three-inch, lowly Delta smelt, and to tell people there’s a manmade drought caused by environmental protections, which is simply bunk. [ESA mandates account for] a mere 2 percent of the Central Valley Project’s water supply reduction in 2014, and the state Water Board estimates that in 2015, only 2 percent of all runoff in the Bay Delta watershed flowed to San Francisco Bay solely for environmental protection. Only 2 percent, and yet still that is some kind of a political outrage here in Washington today.”

Asked which factors have contributed to California’s water shortage, Murillo cited both the drought and the endangered-species mandates. “We can’t ignore the fact that we’ve had low hydrology for the last three or four years. It’s there. That’s what’s impacting our carryover, that’s what’s impacting our operations. In addition to that, we do have some biological opinions that we have to comply with.”

Rep. Costa joined Subcommittee Republicans in blasting the possibility of another zero-allocation year in the San Joaquin Valley, saying the situation was “unacceptable, it’s unavoidable, and it’s immoral.” “Let’s be clear: We’ve been operating these projects during these drought conditions for one first priority only, and that is to try to protect the survivability of Delta smelt and other species. We’ve put that priority over people.”

Lastly, the hearing focused on how to take advantage of the current El Niño wet-weather cycle in order to shore up water supplies before the return of drier conditions in California. “There’s a false belief within the state of California that if you have grass in your yard or have a swimming pool, that’s the cause of the drought,” said Orange County Municipal Water District Director Brett Barbre. “The Metropolitan [Water District] invested \$400 million telling people to tear out their grass. We can conserve all we want, but it’s not going to make a long-term difference. We still need storage.”

From: Tom Birmingham
Sent: Tuesday, March 1, 2016 3:36 PM
To: 'Bina, Betsy'
CC: 'Bernhardt, David L.'
Subject: RE: Meeting Request

Betsy,

Thank you for reaching out to us. I am not sure when I will next be in DC, but I will make sure we get on your calendar on our next trip.

Tom

From: Bina, Betsy [mailto:Betsy.Bina@mail.house.gov]
Sent: Friday, February 26, 2016 2:45 PM
To: 'Tom Birmingham ' <tbirmingham@westlandswater.org>
Subject: Meeting Request

Hello Tom. How are things with you? I've been praying for rain and reasonable political decisions. ☺

Would you be able to meet with me and my colleagues the next time you are in DC. I think they would benefit from knowing you. The Committee's hearing schedule is jam-packed this year. So it's possible that we may not be able to meet on your next trip. But please let me know when you are available.

Many thanks,
Betsy

Betsy Bina
House Interior Appropriations Subcommittee
B-308 Rayburn House Office Building
Washington, D.C. 20002
202-225-3081

From: Bernhardt, David L.
Sent: Thursday, March 3, 2016 3:56 PM
To: Johnny Amaral (jamaral@westlandswater.org)
Subject: List
Attachments: CA Dem Delegation_(14510607_1).XLSX

[Per your request](#)

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Last Name	First Name	District Number	Chief	District Director	Water/natural resources staffer	phone
Aguilar	Pete	31	boris.medzhibovsky@mail.house.gov	teresa.valdes@mail.house.gov	stephanie.cuevas@mail.house.gov	202-225-3201
Bass	Karen	37	carrie.kohns@mail.house.gov	maral.karaccusian@mail.house.gov	samaura.stone@mail.house.gov	202-225-7084
Becerra	Xavier	34	sean.mccluskie@mail.house.gov	liz.saldivar@mail.house.gov	johanna.montiel@mail.house.gov	202-225-6235
Bera	Ami	7	chad.overmiller@mail.house.gov	faith.whitmore@mail.house.gov	erin.oquinn@mail.house.gov	202-225-5716
Brownley	Julia	26	lenny.young@mail.house.gov	carina.armenta@mail.house.gov	jean.fundakowski@mail.house.gov	202-225-5811
Capps	Lois	24	sarah.rubinfield@mail.house.gov	vianey.lopez@mail.house.gov	eliot.crafton@mail.house.gov	202-225-3601
Cardenas	Tony	29	virginia.zigras@mail.house.gov	gabriela.marquez@mail.house.gov	miguel.franco@mail.house.gov	202-225-6131
Chu	Judy	27	linda.shim@mail.house.gov	becky.cheng@mail.house.gov	sonali.desai@mail.house.gov	202-225-5464
Costa	Jim	16	juan.lopez@mail.house.gov	gary.chahil@mail.house.gov	scott.petersen@mail.house.gov	202-225-3341
Davis	Susan	53	lisa.sherman@mail.house.gov	jessica.poole@mail.house.gov	matt.weiner@mail.house.gov	202-225-2040
DeSaulnier	Mark	11	betsyarnoldmarr@mail.house.gov	shanelle.scales@mail.house.gov	emlyn.struthers@mail.house.gov	202-225-2095
Eshoo	Anna	18	No Chief- LD is David.Grossman@mail.house.gov	karen.chapman@mail.house.gov	paul.beck@mail.house.gov	202-225-8104
Farr	Sam	20	rochelle.dornatt@mail.house.gov	alec.arago@mail.house.gov	troy.phillips@mail.house.gov	202-225-2861
Garamendi	John	3	emily.burns@mail.house.gov	john.evalle@mail.house.gov	garrett.durst@mail.house.gov	202-225-1880
Hahn	Janice	44	laurie.saroff@mail.house.gov	lara.larramendi@mail.house.gov	jocelyn.rivera-olivas@mail.house.gov	202-225-8220
Honda	Mike	17	jennifer.vanderheide@mail.house.gov	lenine.umali@mail.house.gov	laurie.chong@mail.house.gov	202-225-2631
Huffman	Jared	2	logan.ferree@mail.house.gov	jenny.callaway@mail.house.gov	noah.oppenheim@mail.house.gov	202-225-5161
Lee	Barbara	13	julie.nickson@mail.house.gov	adrienne.ursino@mail.house.gov	emma.mehrabi@mail.house.gov	202-225-2661
Lieu	Ted	33	marc.cevasco@mail.house.gov	lisa.pinto@mail.house.gov	megan.price@mail.house.gov	202-225-3976
Lofgren	Zoe	19	stacy.leavandosky@mail.house.gov	sandra.soto@mail.house.gov	angela.ebner@mail.house.gov	202-225-3072
Lowenthal	Alan	47	tim.hysom@mail.house.gov	mark.pulido@mail.house.gov	devin.helfrich@mail.house.gov	202-225-7924
Matsui	Doris	6	julie.eddy@mail.house.gov	sam.stefanki@mail.house.gov	jonathan.gilbert@mail.house.gov	202-225-7163
McNery	Jerry	9	nicole.alioto@mail.house.gov	alisa.alva@mail.house.gov	teresa.frison@mail.house.gov	202-225-1947
Napolitano	Grace	32	daniel.chao@mail.house.gov	perla.hernandez@mail.house.gov	joseph.ciccone@mail.house.gov	202-225-5256
Pelosi	Nancy	12	robert.edmonson@mail.house.gov	dan.bernal@mail.house.gov	adela.amador@mail.house.gov	202-225-4965
Peters	Scott	52	michelle.dorothy@mail.house.gov	hugo.carmona@mail.house.gov	kc.jaski@mail.house.gov	202-225-0508
Roybal	Lucille	40	victor.castillo@mail.house.gov	ana.figueroa@mail.house.gov	adam.sachs@mail.house.gov	202-225-1766
Ruiz	Raul	36	cookab.hashemi@mail.house.gov	octavio.gonzalez@mail.house.gov	ross.arnett@mail.house.gov	202-225-5330
Sanchez	Linda	38	lea.sulkala@mail.house.gov	yvette.shahinian@mail.house.gov	andrew.noh@mail.house.gov	202-225-6676
Sanchez	Loretta	46	jennifer.warburton@mail.house.gov	carlos.urquiza@mail.house.gov	lorenzo.rubalcava@mail.house.gov	202-225-2965
Schiff	Adam	28	jeff.lowenstein@mail.house.gov	ann.peifer@mail.house.gov	courtney.fogwell@mail.house.gov	202-225-4176
Sherman	Brad	30	don.macdonald@mail.house.gov	scott.abrams@mail.house.gov	lauren.wolman@mail.house.gov	202-225-5911
Speier	Jackie	14	josh.connolly@mail.house.gov	brian.perkins@mail.house.gov	miriam.goldstein@mail.house.gov	202-225-3531
Swalwell	Eric	15	ricky.le@mail.house.gov	cheri.greven@mail.house.gov	andrew.ginsburg@mail.house.gov	202-225-5065
Takano	Mark	41	richard.mcpike@mail.house.gov	rafael.elizalde@mail.house.gov	claire.viall@mail.house.gov	202-225-2305
Thompson	Mike	5	melanie.rhinehart@mail.house.gov	brad.onorato@mail.house.gov	meridith.sebring@mail.house.gov	202-225-3311
Torres	Norma	35	dara.postar@mail.house.gov	veronica.zendejas@mail.house.gov	grant.kerr@mail.house.gov	202-225-6161
Vargas	Juan	51	tim.walsh@mail.house.gov	janine.pairs@mail.house.gov	aaron.allen@mail.house.gov	202-225-8045
Waters	Maxine	43	twaun.samuel@mail.house.gov	blanca.jimenez@mail.house.gov	kathleen.sengstock@mail.house.gov	202-225-2201

From: Johnny Amaral

Sent: Monday, March 7, 2016 8:01 AM

To: David Bernhardt; Ryan A. ' 'Smith; Denny Rehberg; Dennis Cardoza; Catherine Karen; Ed Manning; Carolyn Jensen; Mike Burns

Subject: No calls today

I have a meeting at 8:30 am PST that's going to go long. Sorry for the short notice

Best,

Johnny Amaral

From: Bernhardt, David L.
Sent: Monday, March 7, 2016 8:17 AM
To: Johnny Amaral
Subject: Re: No calls today

Thx

David Bernhardt

> On Mar 7, 2016, at 10:00 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:
>
>
> I have a meeting at 8:30 am PST that's going to go long. Sorry for the short notice
>
> Best,
>
> Johnny Amaral
>
>

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From: Jean Sagouspe
Sent: Monday, March 7, 2016 3:27 PM
To: TOM BIRMINGHAM
Subject: FW: Federal Barriers- Motion to Dismiss
Attachments: [Doc 22] Mem Order Denying in part MTD and supp briefing.pdf

FYI

From: Leah Zabel [mailto:leah@lrzlaw.com]
Sent: Monday, March 07, 2016 12:39 PM
To: Julie M [REDACTED]; Jean Sagouspe [REDACTED]; Craig Manson
<[REDACTED]>; David Bernhardt <[REDACTED]>
Cc: Law Office of Leah R Zabel <office@lrzlaw.com>; linda <[REDACTED]>
Subject: Federal Barriers- Motion to Dismiss

Hello All:

I am providing a copy of the court's initial ruling on the motion to dismiss. Essentially, the court appears to have agreed with CESAR's arguments, but is allowing for DWR and CESAR to provide additional briefing on the issue of mootness.

I will keep you posted on any developments, however, given that it seems likely we will prevail here and the short time frame, we are starting immediately on the preliminary injunction motion.

Best,
Leah

--

Leah R. Zabel

Attorney At Law

49197 Road 426, Suite C

Oakhurst, CA 93644

P. 559.558.5211

F. 559.570.0211

E. leah@lrzlaw.com

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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

**CENTER FOR ENVIRONMENTAL SCIENCE,
ACCURACY & RELIABILITY, a California
public interest organization,**

Plaintiff,

v.

**MARK W. COWIN, In his Official Capacity As
Director Of CALIFORNIA DEPARTMENT OF
WATER RESOURCES; SALLY JEWELL,
Secretary, U.S. Department of the Interior, in
her official capacity; DAN ASHE, Director, U.S.
Fish and Wildlife Service, in his official capacity;
and UNITED STATES FISH AND WILDLIFE
SERVICE**

Defendants.

CASE NO: 1:15-CV-01852 LJO BAM

**MEMORANDUM DECISION AND
ORDER DENYING IN PART AND
REQUESTING SUPPLEMENTAL
BRIEFING RE MOTION TO
DISMISS; AND HOLDING IN
ABEYANCE MOTION TO AMEND
(Docs. 10 & 18)**

I. INTRODUCTION

The operative Complaint, filed November 19, 2015 by the Center for Environmental Science, Accuracy & Reliability (“CESAR” or “Plaintiff”), seeks declaratory and injunctive relief against construction and operation of an Emergency Drought Salinity Barrier at West False River (“Salinity Barrier” or “the Project”¹) by the California Department of Water Resources (“DWR”). Doc. 1. The Complaint also seeks to require the U.S. Fish and Wildlife Service (“FWS”) to “reinitiate consultation of the 2008 Biological Opinion on the Coordinated Operations of the Central Valley Project [] and State Water Project [] ... due to changed circumstances, to wit, the construction and operation of the Project by the Department.” *Id.* at ¶ 2. Plaintiff claims that the Salinity Barrier was installed and operated without

¹ The parties sometimes refer to the Salinity Barrier as “the Project.”

following procedures necessary to prevent “take” under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, of the ESA-listed delta smelt. *See id.* ¶¶ 46-72. It is undisputed that the Salinity Barrier was installed in May 2015 and completely removed by November 15, 2015. *Id.* at ¶¶ 12, 14, 34

Before the Court for decision is DWR’s motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, or, in the alternative, to dismiss or abstain in accordance with *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Doc. 10. CESAR filed an opposition on February 19, 2016. Doc. 12. DWR filed a reply on February 25, 2016. Doc. 13. The Court took the matter under submission on the papers pursuant to Local Rule 230(g).

II. STANDARD OF DECISION

“To invoke a federal court’s subject matter jurisdiction, a plaintiff needs to provide only a ‘short and plain statement of the grounds for the court’s jurisdiction,’” as required by Rule 8(a)(1), and “must allege facts, not mere legal conclusions, in compliance with the pleading standards established by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). A party may raise a challenge to the court’s exercise of jurisdiction over the subject matter of an action under Federal Rule of Civil Procedure 12(b)(1). Faced with a Rule 12(b)(1) motion, a party seeking to establish jurisdiction bears the burden of proving the existence of such jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3).

A Rule 12(b)(1) jurisdictional attack may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a “facial” attack, the challenger accepts as true the plaintiff’s allegations but “asserts that the allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a “factual” attack, the challenger “contests the truth of the plaintiff’s factual allegations, usually by introducing evidence

outside the pleadings.” *Leite*, 749 F.3d at 1121. In such circumstances, a court may examine extrinsic evidence without converting the motion to one for summary judgment, and there is no presumption of the truthfulness of the Plaintiff’s allegations. *Safe Air for Everyone*, 373 F.3d at 1039. Moreover, the plaintiff “bears the burden of proving by a preponderance of the evidence that each of the requirements for subject-matter jurisdiction has been met.” *Leite*, 749 F.3d at 1121.

III. LEGAL BACKGROUND

“Under the ESA, the Secretary of the Interior and the Secretary of Commerce are charged with identifying threatened and endangered species and designating critical habitats for those species.” *Natural Res. Def. Council v. Jewell*, 749 F.3d 776, 778 (9th Cir. 2014) (en banc) (“*NRDC v. Jewell*”) (citing 16 U.S.C. § 1533). FWS and the National Marine Fisheries Service (“NMFS”) administer the ESA on behalf of the Departments of the Interior and Commerce, respectively. *See* 50 C.F.R. §§ 17.11, 222.101(a), 223.102, 402.01(b). Section 7 of the ESA (“Section 7”) requires federal agencies to ensure that their activities do not jeopardize the continued existence of listed endangered or threatened species or adversely modify those species’ critical habitats. 16 U.S.C. § 1536(a)(2); *see also Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012). Section 7’s implementing regulations provide that “[e]ach Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat[s].” 50 C.F.R. § 402.14(a). An agency proposing to take an action (often referred to as the “action agency”) must first inquire of FWS² whether any threatened or endangered species “may be present” in the area of the proposed action. *See* 16 U.S.C. § 1536(c)(1). If endangered species may be present, the action agency must prepare a “biological

² Generally, FWS has jurisdiction over species of fish that either (1) spend the major portion of their life in fresh water, or (2) spend part of their lives in estuarine waters, if the remaining time is spent in fresh water. *See Cal. State Grange v. Nat’l Marine Fisheries Serv.*, 620 F. Supp. 2d 1111, 1120 n.1 (E.D. Cal. 2008), as corrected (Oct. 31, 2008). NMFS is granted jurisdiction over fish species which (1) spend the major portion of their life in ocean water, or (2) spend part of their lives in estuarine waters, if the remaining portion is spent in ocean water. *Id.* FWS exercises jurisdiction over the delta smelt. Therefore, the remainder of this Memorandum Decision references only FWS as the agency administering the relevant ESA provisions.

assessment” (“BA”) to determine whether such species “is likely to be affected” by the action. *Id.* If the BA determines that a threatened or endangered species “is likely to be affected,” the agency must formally consult with FWS. *See id.* § 1536(a)(2); 50 C.F.R. 402.14. Formal consultation results in the issuance of a “biological opinion” (“BiOp”) by FWS. *See id.* § 1536(b). If the BiOp concludes that the proposed action would jeopardize the species or destroy or adversely modify critical habitat, *see id.* § 1536(a)(2), then the action may not go forward unless FWS can suggest a “reasonable and prudent alternative[.]” (“RPA”) that avoids jeopardy, destruction, or adverse modification. *Id.* § 1536(b)(3)(A). If the BiOp concludes that jeopardy is not likely and that there will not be adverse modification of critical habitat, or that there is a “reasonable and prudent alternative[]” to the agency action that avoids jeopardy and adverse modification, and that the incidental taking of endangered or threatened species will not violate section 7(a)(2), the consulting agency can issue an “Incidental Take Statement” which, if followed, exempts the action agency from the prohibition on takings found in Section 9 of the ESA. 16 U.S.C. § 1536(b)(4); *ALCOA v. BPA*, 175 F.3d 1156, 1159 (9th Cir. 1999).

Even after consultation is complete, an agency has a duty to reinitiate formal consultation under certain circumstances, including where (1) “the amount or extent of taking specified in the incidental take statement is exceeded”; (2) “if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered”; or (3) “[i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.” 50 C.F.R. § 402.16. “The consultation requirement reflects “a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” *Karuk Tribe*, 681 F.3d at 1020 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978)).

Regulations promulgated to implement the ESA’s consultation provisions provide that “[w]here emergency circumstances mandate the need to consult in an expedited manner, consultation may be conducted informally through alternative procedures” followed by formal consultation once the

emergency is abated. 50 C.F.R. § 402.05(a). The regulations explain that “[t]his provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.” *Id.* The FWS & NMFS Section 7 Consultation Handbook (“Handbook”)³ provides further detail, explaining that “[a]n emergency is a situation involving an act of God, disasters, casualties, national defense or security emergencies, etc., and includes response activities that must be taken to prevent imminent loss of human life or property.” Handbook at 8-1. The action agency is responsible for determining whether an emergency exists and must submit information to either FWS or NMFS, as appropriate, describing the nature of the emergency action and the justification for the expedited consultation. 50 C.F.R. § 402.05(b).

During the initial stage of emergency consultation, FWS’s role “is to offer recommendations to minimize the effects of the emergency response action on listed species or their critical habitat (the informal consultation phase).” Handbook at 8-1, § 8.2(A). FWS may not “stand in the way of the response efforts.” *Id.* As soon as practicable after the emergency is under control, the action agency must initiate formal consultation with FWS if listed species or critical habitat have been adversely affected by emergency response activities. 50 C.F.R. § 402.05(b); Handbook at 8-4, § 8.2(B). “Although formal consultation occurs after the response to the emergency, procedurally it is treated like any other formal consultation,” Handbook at 8-4, § 8.2(B), and culminates in FWS’s issuance of a biological opinion, and, if appropriate, incidental take statement, *id.* at 8-4 to 8-5, § 8.2(C)-(D); 50 C.F.R. § 402.05(b).

IV. FACTUAL BACKGROUND

The Central Valley Project (“CVP”) and the State Water Project (“SWP”), “operated respectively by the Bureau of Reclamation (“Reclamation”) and the [DWR for the] State of California, are perhaps the two largest and most important water projects in the United States.” *San Luis & Delta-*

³ Available at http://www.fws.gov/Endangered/esa-library/pdf/esa_section7_handbook.pdf (last visited June 17, 2015).

1 *Mendota Water Auth. v. Jewell*, 747 F.3d 581, 592 (9th Cir. 2014). “These combined projects supply
2 water originating in northern California to more than 20,000,000 agricultural and domestic consumers in
3 central and southern California.” *Id.* As part of CVP operations, Reclamation releases water stored in
4 CVP reservoirs in northern California, which then flows down the Sacramento River to the Sacramento-
5 San Joaquin Delta (“Delta”). *Id.* at 594. Pumping plants in the southern region of the Delta then divert to
6 various users south of the Delta. *See id.* at 594-95.

7 The delta smelt (*Hypomesus transpacificus*) is a “small, two-to-three inch species of fish
8 endemic to the [Delta].” *Id.* at 595. In 1993, FWS concluded the delta smelt’s population had declined
9 by ninety percent over the previous twenty years and listed it as a “threatened” species under the ESA.
10 Determination of Threatened Status for the Delta Smelt, 58 Fed. Reg. 12,854, 12,855 (Mar. 5, 1993).
11 FWS further determined that “Delta water diversions,” including those resulting from operations of the
12 SWP and CVP, are the most significant “synergistic cause[]” of the decline in the delta smelt population.
13 *Id.* at 12,859.

14 According to the complaint, DWR claims installation of the Salinity Barrier was necessary to
15 protect a “relatively small segment of the State’s water users from costs related to saltwater inflow from
16 the ocean.” Doc. 1 (“Compl.”) at ¶ 3. The Complaint further alleges that DWR first proposed barrier
17 installation in the Delta in 2008. *Id.* at ¶ 37. DWR formally announced a project involving rock barriers
18 across three different channels at West False River in early 2014. *Id.* In January 2015, DWR began to
19 formally study a three-barrier project and applied to the Army Corps of Engineers (“Army Corps”) for a
20 Clean Water Act permit (“CWA Permit”) to install three barriers. *Id.* at ¶ 38. In late April 2015, DWR
21 amended its proposed project to a single 750-foot wide rock barrier to be installed at West False River.
22 *Id.* at ¶¶ 37-39. In early May 2015, after initiating “emergency consultation” with FWS, the Army Corps
23 issued a CWA Permit for the Project, DWR approved the Project, and construction commenced. *Id.*

24 Plaintiff filed suit in the Superior Court of California for Sacramento County on May 6, 2015,
25 raising claims under the California law and the federal ESA, Defendant’s Request for Judicial Notice

(“DRJN”), Doc. 10-2, Ex. 4, and immediately applied ex parte for a temporary restraining order to halt construction of the Salinity Barrier. *Id.*, Ex. 5. Hon. Christopher Krueger held a hearing and issued a minute order denying the request for a temporary restraining order on May 15, 2015. *Id.*, Ex. 6. On June 22, 2015, CESAR filed a “First Amended Petition for Writ of Mandate and Complaint for Declaratory Relief,” from which they omitted any federal ESA claims. *Id.*, Ex. 7. On October 22, 2015, the state court sustained DWR’s demurrer and dismissed the entire action. *Id.*, Ex. 10-12. On December 18, 2015, Plaintiff filed a notice of appeal. *Id.*, Ex. 13.

On June 11, 2015, Plaintiff commenced the instant action and moved for injunctive relief against construction of the Project. *Id.*, Ex. 14 (*Center for Environmental Science, Accuracy and Responsibility v. Cowin*, 1:15-cv-00884 LJO BAM (“*CESAR I*”), Doc. 1). Plaintiff claimed installation and operation of the Project violated the ESA. *Id.* On June 18, 2015, the Court denied Plaintiff’s motion for a temporary restraining order. *CESAR I*, Doc. 22. On September 14, 2015, the Court granted DWR’s motion to dismiss *CESAR I* on the ground that Plaintiff had failed to comply with the ESA’s 60-day notice requirement. *CESAR I*, Doc. 36.

V. DISCUSSION

A. 60-Day Notice Requirement.

The ESA precludes the commencement of citizen suits “prior to sixty days after written notice of the violation has been given to the [FWS], and to any alleged violator of any such provision or regulation.” 16 U.S.C. § 1540(g)(2)(A)(i). The 60-day notice requirement is “jurisdictional, and thus failure to strictly comply is an absolute bar to bringing suit under the ESA.” *Conservation Congress v. Finley*, 774 F.3d 611, 617 (9th Cir. 2014) (internal quotation and citation omitted). To satisfy the notice requirement, a plaintiff must “provide sufficient information of a violation so that [FWS and/or the action agency] could identify and attempt to abate the violation.” *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 522 (9th Cir. 1998).

Here, Plaintiff alleges that:

As required by 16 U.S.C. § 1540(g)(2)(A)(i), plaintiff, CESAR, provided the defendants notice of the violations described in this complaint by letters dated September 18, 2015. Plaintiff sent the notice to each of the defendants by U.S. mail. More than 60 days have passed since Defendants received these notices and Defendants have not responded to the notices. At no time has the Secretary of the Department of Interior initiated an action related to the Project pursuant to 16 USC 1540(a) and has not brought a criminal action against the party in federal or state court.

Compl. at ¶ 33.

Defendant moves to dismiss for lack of subject matter jurisdiction because Plaintiff does not attach any 60-day notice letter to the Complaint. *See* Doc. 10 at 5. But Defendant fails to cite and the Court cannot locate any authority requiring notice letters be attached to an ESA Complaint. Plaintiff has, instead attached its notice of intent to sue letter (“Notice Letter”) to its opposition to the instant motion to dismiss. *See* Declaration of Leah R. Zabel (“Zabel Decl.”), Doc. 12-1 & Attachments. Defendant points to *Southwest Center*, 143 F.3d at 520, to suggest that Plaintiff must “properly allege compliance with the ESA’s notice requirement” and that such allegations must specifically describe the content of the notice letters. *See* Doc. 13 at 2. *Southwest Center* says nothing of the sort. Rather, *Southwest Center* articulates the specificity with which notice must be given in the notice letter. *Id.* at 520-22. The Complaint sufficiently alleges compliance with the ESA’s notice requirements. The fact that CESAR was “warned” about the notice requirement in a prior order in *CESAR I* does not change the fact that the law does not require notice letters be attached to the Complaint.

Defendant does not argue that the Notice Letters provide insufficient notice of the allegations contained in the complaint. *See* Doc. 13 at 2-3. Although the Court is under no *sua sponte* obligation to compare the Notice Letter to the Complaint, even a cursory review of the two documents reveals that the Notice Letter parallels the allegations in the Complaint closely enough to “provide sufficient information of a violation so that [FWS] could identify and attempt to abate the violation.” *Sw. Ctr.*, 143 F.3d at 522.

Defendant points out that the Notice Letter “muddies the waters,” at least somewhat, by referring

both to the now-removed summer 2015 barrier and elsewhere to unspecified other “barriers,” presumably possible future barriers. *See* Zabel Decl., Ex. 2 (Doc. 12-3). To the extent the Notice Letter refers to anticipatory violations, those violations are not actionable, *see, e.g., Natural Res. Def. Council v. Kempthorne*, 539 F. Supp. 2d 1155, 1179 (E.D. Cal. 2008), but it does not appear that Plaintiffs are raising presently any challenges to anticipated barriers in the Complaint. To the extent that the Notice Letter and the Complaint challenge past violations, Defendant argues such claims are moot. Mootness, is a separate issue and is, therefore, discussed separately below. The motion to dismiss on this ground is DENIED.

B. Mootness.

Defendant next argues that the Court lacks subject matter jurisdiction over the case because Plaintiff’s claims are moot. Doc. 10-1 at 7-11. An issue is moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000). “The underlying concern is that, when the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated, then it becomes impossible for the court to grant any effectual relief whatever to the prevailing party.” *Id.* (internal citations and quotations omitted). If the parties cannot obtain any effective relief, any opinion about the legality of a challenged action is advisory. *Id.* “Mootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n. 22 (1997) (internal citation and quotation omitted). “[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.” *Id.* at 67.

“The party asserting mootness has a heavy burden to establish that there is no effective relief remaining for a court to provide.” *In re Palmdale Hills Property, LLC*, 654 F.3d 868, 874 (9th Cir. 2011). Mootness is evaluated on a claim-by-claim basis. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 52 F. Supp. 3d 1020, 1045 (E.D. Cal. 2014); *Pac. Nw. Generating Co-op. v. Brown*, 822 F. Supp.

1479, 1506 (D. Or. 1993), *aff'd*, 38 F.3d 1058 (9th Cir. 1994) (citing *Headwaters, Inc. v. Bureau of Land Management*, 893 F.2d 1012, 1015-16 (9th Cir. 1989) (separately addressing mootness as to different forms of relief requested)); *see also In re Pac. Lumber Co.*, 584 F.3d 229, 251 (5th Cir. 2009) (evaluating mootness on a claim-by-claim basis).

It is undisputed that the Project challenged in the Complaint, the drought barrier installed in May 2015, was removed as of November 15, 2015, several days before the Complaint was filed. Therefore, this case is technically moot. Even so, an otherwise moot case may nevertheless be justiciable if one of three exceptions to the mootness doctrine applies: (1) where a plaintiff “would suffer collateral legal consequences if the actions being appealed were allowed to stand”; (2) where defendant voluntarily ceased the challenged practice; or (3) for “wrongs capable of repetition yet evading review.” *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 964-66 (9th Cir. 2007).

Here, Plaintiff appears to rely on the third exception, for “wrongs capable of repetition yet evading review,” by arguing that there is a “reasonable expectation” that the “drought barriers” will be reconstructed. *See* Doc. 12 at 3. This exception “permit[s] suits for prospective relief to go forward despite abatement of the underlying injury [in] exceptional⁴ situations where the following two circumstances [are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.” *Fed. Elec. Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (internal citations and quotations omitted); *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 703 (9th Cir. 2012); *San Luis & Delta-Mendota Water Auth. v. U.S. Dep't of the Interior*, 870 F. Supp. 2d 943, 959 (E.D. Cal. 2012) (“*San Luis v. DOI*”).

The first factor – whether the duration of the challenged action is too short to allow for complete

⁴ In line with the Supreme Court's explanation that this exception only applies in exceptional cases when the two stated conditions are met, the Ninth Circuit only applies the exception in “extraordinary cases.” *West Coast Seafood Processors Ass'n v. Natural Res. Def. Council*, 643 F.3d 701, 704 (9th Cir. 2011).

litigation – is present here. The challenged action lasted from May through November 2015. While it may have been possible to file and resolve a motion for emergency injunctive relief during that timeframe, it is not possible to fully litigate an ESA challenge in such a short period of time. *See Meyer v. Grant*, 486 U.S. 414, 417 (1988) (where state law permitted only six months to obtain necessary signatures to place an initiative on the ballot, challenge to other aspects of the state’s initiative procedure could not be litigated fully before time period expired); *see also Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 787 (9th Cir. 2012) (suggesting processes lasting from between 12 and 17 months are likely to “evade review” before completion).⁵

The second factor – whether there is a reasonable expectation that Plaintiff would be subject to the same action again – is a closer call. “Under the ‘capable of repetition’ prong of the exception to the mootness doctrine, [a plaintiff has] the burden of showing that there is a reasonable expectation that [it] will once again be subjected to the challenged activity.” *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir. 1985) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)). “Specifically, the plaintiff must establish a demonstrated probability that the same controversy will recur involving the same litigants.” *Id.* (citing *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)). According to the CWA permit filed by DWR with the Army Corps, DWR is again requesting authorization for the installation of a “West False River Salinity Barrier”⁶ as early as April 1, 2016, to be removed by November 20, 2016, “if DWR, in

⁵ Defendant cites *Native Village Of Noatak v. Blatchford*, 38 F.3d 1505, 1509-10 (9th Cir. 1994), for the proposition that “CESAR cannot demonstrate how [] any possible future construction of a drought barrier or barriers is inherently limited in duration such that it is likely to become moot before federal court litigation is complete, especially considering that construction of any barrier will take several weeks.” Doc. 13 at 7. But, *Noatak* does not support this assertion. In *Noatak*, the plaintiffs challenged a statute that was in place for four years, before being repealed. *Id.* at 1510. The Ninth Circuit found that this four-year period was “ample time” within which to challenge enforcement of regulations promulgated under that statute while they were in place. *Id.* Defendant’s citation of this case in this manner verges on misrepresentation. Likewise, the Court finds *Center for Biological Diversity v. Lohn*, 511 F.3d 960, 965 (9th Cir. 2007), cited by Defendant, inapposite. There, the plaintiff challenged NMFS’s application of a particular policy to conclude listing of a species was not warranted. *Id.* at 962. NMFS later determined that the species warranted a listing status, and moved to dismiss the lawsuit as moot. *Id.* The Ninth Circuit concluded that the application of the policy to deny a listing was not “inherently limited in duration such that it is likely always to become moot before federal court litigation is completed.” *Id.* at 965. This conclusion made sense in the context of that case, where the agency’s reversal on the ultimate listing determination was not tied to any predictable timeframe. Here, by contrast, the Project itself is of “inherently limited duration.”

⁶ Even though the grammar of the 2016 CWA permit application leaves open the possibility that more than one barrier would be installed at West False River, Defendant offers no authority to suggest that the “capable of repetition yet evading review”

1 cooperation with other State and federal agencies, determines that a drought has reduced water storage
2 in the [SWP] to critical levels, such that projected Delta outflow could not control increased salinity in
3 the Delta.” Defendant’s Second Request for Judicial Notice, Ex. 1, Doc. 14-1. Although the Court
4 cannot divine the coming year’s hydrology, documents submitted by DWR suggest that there is a not
5 insignificant chance that drought conditions will persist for years to come. *See* DRJN, Ex. 1 (January 17,
6 2014 Proclamation of State of Emergency by California Governor Edmund G. Brown (stating
7 “extremely dry conditions have persisted since 2012 and may continue beyond this year and more
8 regularly into the future, based on scientific-projections regarding the impact of climate change on
9 California's snowpack....”). This is sufficient to establish a “demonstrated probability” that a drought
10 barrier may be needed in 2016.

11 What is far less clear is how the relevant government agencies will approach their
12 responsibilities under the ESA. Plaintiff’s chief complaint in this case is that the approval process for the
13 installation of the Salinity Barrier in 2015 utilized the ESA’s emergency consultation procedures, rather
14 than the standard consultation process. Nothing in the complaint (or any other part of the present record)
15 indicates with clarity how the relevant agencies will approach ESA consultation in 2016. Therefore, it
16 remains unclear whether “there is a reasonable probability that the same controversy will recur involving
17 the same litigants.” However, pleading standards do permit the Court to make reasonable inferences
18 from facts alleged in the Complaint. *Iqbal*, 556 U.S. at 663 (“A claim has facial plausibility when the
19 pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for
20 the misconduct alleged.”). It is now early March 2016. If DWR plans to install a drought barrier as soon
21 as May 2016, it is not unreasonable to infer that emergency consultation is the only form of consultation
22 that can be accomplished within this timeframe. The Court will not reach this conclusion, however,
23 without affording Defendants an opportunity to demonstrate otherwise. A briefing schedule for
24

25 exception would not apply where the potential repetition involves a larger, more complex version of the original Project.

supplemental filings on this issue is set forth below.

C. Colorado River.

DWR argues that this Court should dismiss this action under the abstention doctrine articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Federal courts have a “virtually unflagging” obligation to adjudicate claims within their jurisdiction. *Id.*; *United States v. Morros*, 268 F.3d 695, 703 (9th Cir.2001). As such, “abstention is permissible only in a few carefully defined situations with set requirements.” *Morros*, 268 F.3d at 703 (internal quotation marks omitted); *see also Colo. River*, 424 U.S. at 813, 96 S.Ct. 1236 (noting that abstention is proper only in “exceptional circumstances”). The Ninth Circuit has summarized the *Colorado River* doctrine and related Circuit jurisprudence as follows:

[I]n *Colorado River* ... the federal government brought suit against water users in federal court, seeking a declaration of water rights in certain rivers and tributaries in Colorado. [424 U.S.] at 805. Colorado had previously established seven water districts to adjudicate water rights in ongoing state court proceedings. *Id.* at 804. After the government filed its suit in federal court, several of the defendants in that case filed an application joining the government as a party in the state court proceedings for the relevant water district. *Id.* at 806. The district court then dismissed the government's federal suit in light of the ongoing state court proceedings. On appeal, the Supreme Court held that although none of the traditional abstention doctrines applied, “considerations of [w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,” justified dismissal of the federal suit. *Id.* at 817 (alteration in original) (internal quotation marks omitted). The Court noted several factors that supported dismissal, relying particularly on the “highly interdependent” relationship between the claims in the state and federal proceedings and the federal policy, embodied in the McCarran Amendment, of avoiding piecemeal adjudication of water rights. *Id.* at 819-20

The [Supreme] Court has carefully limited *Colorado River*, emphasizing that courts may refrain from deciding an action for damages only in “exceptional” cases, and only “the clearest of justifications” support dismissal. *Id.* at 818-19. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court held that no exceptional circumstances justified the district court's stay of an action to compel arbitration under the Federal Arbitration Act. 460 U.S. 1, 19 (1983). The Court noted that although a state court suit involving the underlying claims was pending when the federal suit was filed, the federal suit did not increase the risk of

piecemeal litigation; substantial progress had already been made in the federal suit; federal law provided the rule of decision on the merits of the case; and there was substantial doubt as to whether the state court could issue the remedy sought in federal court. *Id.* at 19-26.

To decide whether a particular case presents the exceptional circumstances that warrant a Colorado River stay or dismissal, the district court must carefully consider “both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise.” *Colorado River*, 424 U.S. at 818. Drawing from *Colorado River*, *Moses H. Cone* and subsequent Ninth Circuit cases, we have recognized eight factors for assessing the appropriateness of a Colorado River stay or dismissal: (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court. *Holder [v. Holder]*, 305 F.3d [854,] 870 [(9th Cir. 2002)].

R.R. St. & Co. Inc. v. Transp. Ins. Co., 656 F.3d 966, 978-79 (9th Cir. 2011) (footnotes omitted).⁷

“These factors are to be applied in a pragmatic and flexible way, as part of a balancing process rather than as a mechanical checklist.” *Am. Int’l Underwriters (Philippines), Inc. v. Cont’l Ins. Co.*, 843 F.2d 1253, 1257 (9th Cir. 1988). Yet, “[a]ny doubt as to whether a factor exists should be resolved against a stay.” *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1369 (9th Cir. 1990).

Here, although there are numerous reasons why *Colorado River* abstention is inappropriate, the Court will address two prominent factors. First, the state court proceedings cannot resolve all issues before the federal court because it is undisputed the state court case has been dismissed. Defendants do not cite and the Court cannot locate a single case applying Colorado River abstention where the parallel state court litigation is not ongoing. The fact that Plaintiff has filed a notice of appeal does not change the fact that judgment has been entered in the state court case.

Second, despite the fact that Plaintiff included an ESA claim in its original state law complaint,

⁷ Although a court may either stay or dismiss a case or claims under *Colorado River*, the Ninth Circuit generally requires a stay rather than a dismissal. *R.R. St. & Co.*, 656 F.3d at 978 n.8

see Doc. 10-2 at Ex. 4, ¶¶ 31-35, which otherwise sought relief for violations of state law, Plaintiff likely could not have obtained relief in state court under the federal ESA. *See San Bernardino Valley Audubon Soc. v. Metro. Water Dist.*, 71 Cal. App. 4th 382, 391 (1999) (citing 16 U.S.C. § 1540(c) for the proposition that federal court is the proper forum to allege violations of the federal ESA); *see also* 16 U.S.C. § 1540(c) (“The several district courts of the United States, including the courts enumerated in section 460 of Title 28, shall have jurisdiction over any actions arising under this chapter.”)

VI. CONCLUSION

For the reasons set forth above:

(1) Defendant’s motion to dismiss is DENIED as to the 60-day notice issue;

(2) Defendant’s motion to dismiss/stay under *Colorado River* is DENIED; and

(3) Defendant shall have until March 16, 2016 to submit a supplemental brief not to exceed 7 pages (not including necessary exhibits) on the subject of mootness, as discussed above; Plaintiff shall have seven (7) additional days to file a response with the same page limit.

Because the pending motion to amend the complaint, Doc. 18, rests largely on the argument that amendment is necessary to cure deficiencies in the complaint pointed out by the instant motion to dismiss, the Court believes it is in the interest of judicial efficiency to hold the motion to amend in abeyance until the mootness issue is resolved, particularly because the proposed amended complaint does not substantially alter the state of the record on the key mootness issue identified herein.⁸

IT IS SO ORDERED.

Dated: March 4, 2016

/s/ Lawrence J. O’Neill
UNITED STATES DISTRICT JUDGE

⁸ The Court is aware that CESAR has requested to shorten time for hearing the motion to amend, Doc. 18-1, but because that request is premised entirely on the ground that the motion to dismiss is pending, *id.*, the Court declines to shorten time on the motion to amend.

From: Bina, Betsy
Sent: Thursday, March 10, 2016 9:33 AM
To: 'Tom Birmingham'
CC: 'Bernhardt, David L.'
Subject: RE: Meeting Request

That would be great. Thank you Tom!

From: Tom Birmingham [mailto:tbirmingham@westlandswater.org]
Sent: Tuesday, March 01, 2016 5:36 PM
To: Bina, Betsy <Betsy.Bina@mail.house.gov>
Cc: 'Bernhardt, David L.' <DBernhardt@BHFS.com>
Subject: RE: Meeting Request

Betsy,

Thank you for reaching out to us. I am not sure when I will next be in DC, but I will make sure we get on your calendar on our next trip.

Tom

From: Bina, Betsy [<mailto:Betsy.Bina@mail.house.gov>]
Sent: Friday, February 26, 2016 2:45 PM
To: 'Tom Birmingham ' <tbirmingham@westlandswater.org>
Subject: Meeting Request

Hello Tom. How are things with you? I've been praying for rain and reasonable political decisions. ☺

Would you be able to meet with me and my colleagues the next time you are in DC. I think they would benefit from knowing you. The Committee's hearing schedule is jam-packed this year. So it's possible that we may not be able to meet on your next trip. But please let me know when you are available.

Many thanks,
Betsy

Betsy Bina
House Interior Appropriations Subcommittee
B-308 Rayburn House Office Building
Washington, D.C. 20002
202-225-3081

From: Bernhardt, David L.
Sent: Thursday, March 10, 2016 12:06 PM
To: Johnny Amaral (jamaral@westlandswater.org)
Subject: FW: From Greenwire -- CALIFORNIA: Water district to pay rare federal fine

FYI

From: dbernhardt [mailto:email_this@eenews.net]
Sent: Thursday, March 10, 2016 2:05 PM
To: Bernhardt, David L.
Subject: From Greenwire -- CALIFORNIA: Water district to pay rare federal fine

This Greenwire story was sent to you by: dbernhardt@bhfs.com

Greenwire

AN E&E PUBLISHING SERVICE

CALIFORNIA: **Water district to pay rare federal fine**

Published: Thursday, March 10, 2016

Federal regulators yesterday slapped the country's largest agricultural water district with an uncommon fine for misguiding bond investors about its financial standing.

At a 2010 board meeting, Thomas Birmingham, general manager of central California's Westlands Water District, playfully suggested "a little Enron accounting" to exaggerate the agency's earnings. Doing so would ward off a rate increase for customers, the U.S. Securities and Exchange Commission said.

According to the SEC, that faulty information was then seen as a security and aided a \$77 million bond investment in 2012.

The SEC's fine marks only the second time it has monetarily penalized a municipal bond issuer.

The California water district has said it will pay the \$125,000 penalty, and Birmingham and another official said they would pay additional fines totaling \$70,000.

Westland executives said they feared drought would cut into their earnings and scare off investors. Rather than implementing a rate hike for consumers, they fudged their accounting to make the agency appear more profitable.

The water district's actions "left investors in the dark about Westlands Water District's true financial condition," said Andrew Ceresney, director of the SEC's enforcement division.

Under the settlement with the SEC, Westland executives have not admitted innocence or guilt but have said they were following the advice of independent auditors (Knickmeyer/Smith, [AP/ABC News](#), March 9). -- AS

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From: Johnny Amaral

Sent: Thursday, March 10, 2016 9:32 PM

To: David Bernhardt; Ryan A. ' 'Smith; Denny Rehberg; Dennis Cardoza; Catherine Karen

Subject: No pre-call tomorrow

Best,

Johnny Amaral

From: Bernhardt, David L.
Sent: Friday, March 11, 2016 2:19 PM
To: Johnny Amaral
Subject: Fwd: Feinstein Calls for Increased Pumping to Capture Water from March Storms
Attachments: image001.png; image003.jpg; image005.jpg

FYI

David Bernhardt

Begin forwarded message:

From: "Watts, John (Feinstein)" <John_Watts@feinstein.senate.gov>
Date: March 11, 2016 at 2:15:02 PM MST
To: "Bernhardt, David L." <DBernhardt@BHFS.com>
Subject: Feinstein Calls for Increased Pumping to Capture Water from March Storms



For Immediate Release
March 11, 2016

Contact: Tom Mentzer
(202) 224-9629

Feinstein Calls for Increased Pumping to Capture Water from March Storms

Washington—Senator Dianne Feinstein (D-Calif.) today released the following statement calling on federal agencies to increase pumping as much as possible within the bounds of the biological opinions to capture and store more water during March storms:

“Between January 1 and March 6 last year, 1.3 million acre feet of water flowed through the Delta and 651,000 acre feet were pumped out. During the same period this year, 2.8 million acre feet of water flowed through the Delta, but only 627,000 acre feet were pumped out (see Chart A below).

“Pumping less water even though river flows more than doubled means 180,000 to 200,000 acre-feet of water was allowed to flow out to the sea instead of being captured and stored—enough water to supply 360,000 homes for a year. It’s inexcusable that pumping levels have been reduced without sufficient evidence of fish mortality, even while biological opinions would allow more pumping.

“January flows topped 50,000 cubic feet per second and peaked again in mid-February above 42,000 cubic feet per second. But rather than pumping as much water as possible under the biological opinions, pumping levels were ratcheted down for an entire month between mid-January and mid-February.

“In some instances these decisions were made even though available data suggested no smelt or salmon were anywhere near the pumps. I agree that pumping should be curtailed when these species are near the pumps, but in many cases the evidence simply didn’t support that conclusion. In other cases, adult smelt were spotted as far as 17 miles from pumps, which led to reduced pumping levels.

“Even if so-called turbidity bridges were present and required some reductions, many other days of high flows were squandered (see Chart B below). And it’s important to note that so far in 2016, only three smelt have actually been caught in the pumps.

“This is clear evidence of the need for legislation to allow more water to be pumped during periods of high river flows while still adhering to environmental laws and the biological opinions and their adaptive management provisions. I believe now more than ever that the bill I submitted last month is necessary, appropriate and will result in real help during this historic drought.

“By requiring daily monitoring of fish near the pumps during times of high turbidity, real-time data can be used to inform decisions rather than relying on intuition. I hope the Senate Energy and Natural Resources Committee will hold a mark-up of my bill as soon as possible so the Senate can debate it. It’s time to act.

Effects of lower pumping

“Just last week I met with 25 emerging leaders in California’s agriculture industry. One young farmer from Firebaugh told me that both he and his father lost their farms because of the drought, farms that employed 450 workers who harvested 4,800 acres of cantaloupes and honeydew melons.

“There are real-world consequences to the decisions being made in the Delta. That’s why we need to make sure we’re using every possible tool make the right choices. Basing pumping decisions on better science and real-time monitoring is the least we can do.”

Charts

Chart A (*click for larger image*) shows that even though 2016 river flows are more than double those in 2015, less water has been pumped out of the Delta. (The chart was created by the San Luis and Delta-Mendota Water Authority.)

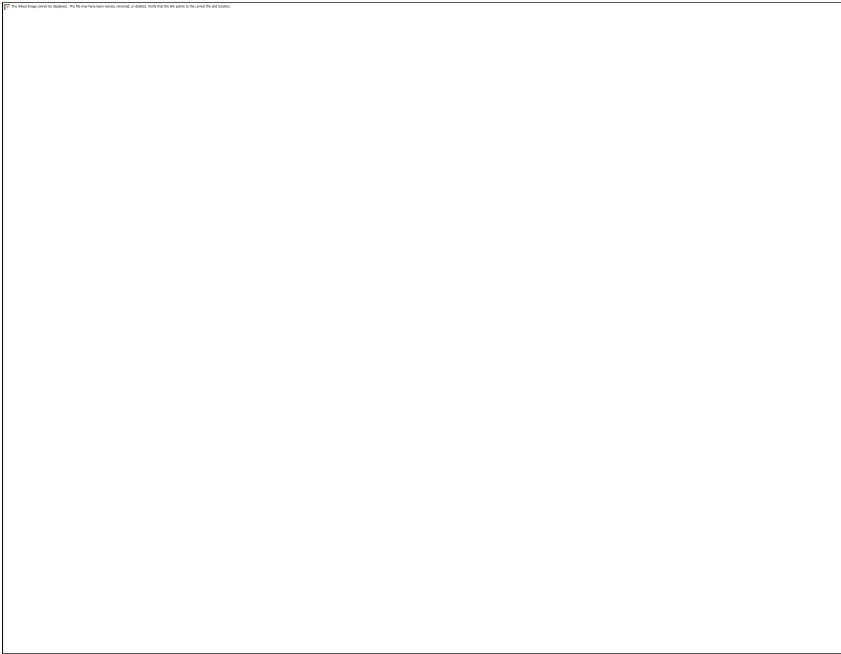
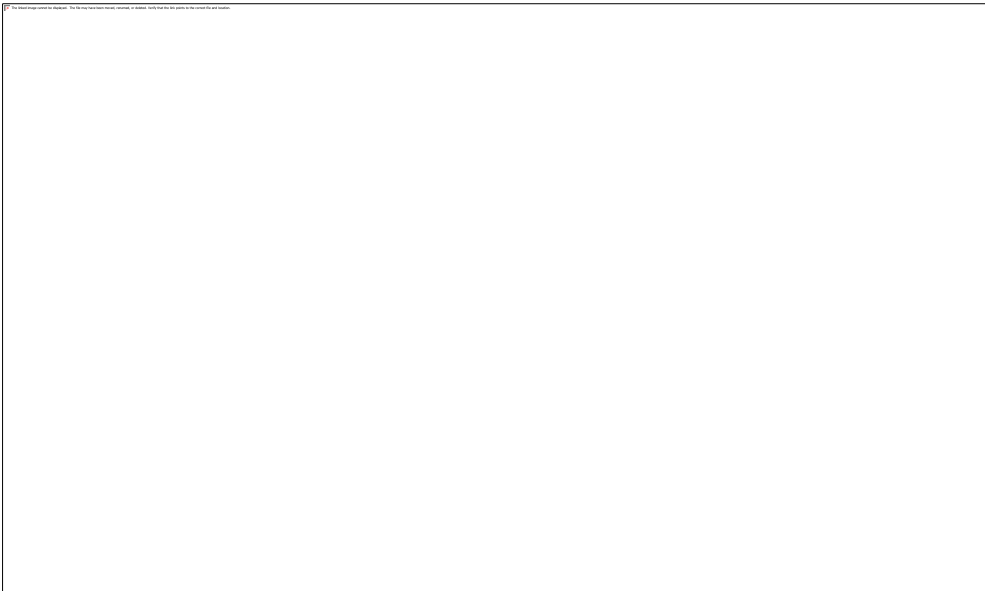


Chart B (*click for larger image*) below shows that during some of the periods of highest river flows, pumping levels were actually reduced. Some of these reductions came due to concerns about turbidity, but many days of high river flows without elevated turbidity also saw reduced pumping. (The chart was created by Senator Feinstein's office using data from the California Department of Water Resources, the Bureau of Reclamation, U.S. Fish and Wildlife Service, NOAA Fisheries and the United States Geological Survey.)



###

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From: Bernhardt, David L.
Sent: Sunday, March 13, 2016 5:44 PM
To: Johnny Amaral
Subject: Meeting

Johnny: I need to be in a meeting with the head of CEQ that just got moved to 1:00 p m. Tomorrow. That said, I need to talk to you about drainage tomorrow afternoon.

David



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From: Jason Peltier

Sent: Tuesday, March 15, 2016 8:53 AM

To: Ara Azhderian; Johnny Amaral; Dennis Cardoza; David Bernhardt; Ed Manning; Carolyn Jensen

Subject: FW: Drought Letter

Attachments: March2016 Western letter to Senate ENR Committee_FINAL.PDF

From: Dan Keppen [mailto:dankeppen@charter.net]

Sent: Tuesday, March 15, 2016 8:52 AM

To: April Snell <aprils@owrc.org>; Bill Luce <wluce@friantwater.org>; 'Bill Plummer' <[REDACTED]@[REDACTED]> 'Brad Wind' <bwind@ncwcd.org>; 'Bruce Whitehead' <brucew@southwesternwater.org>; 'Cary Keaten' <ckeaten@sidwater.org>; Chanee Grant <cgrant@nmid.org>; 'Chris Udall' <Chris@agribusinessarizona.org>; 'Chris Voight' <[REDACTED]@[REDACTED]> Clifford Searle <cntsearle@pmt.org>; 'Clinton Pline' <[REDACTED]@[REDACTED]> Dale Swensen <[REDACTED]@[REDACTED]> 'Daren Coon' <DCoon@nmid.org>; 'Dave Solem' <dsolem@scbid.org>; 'David Mansfield' <[REDACTED]@[REDACTED]> 'Don Kraus' <dkraus@cnppid.com>; 'Gary Esslinger' <gessler@ebid-nm.org>; 'Gering Ft Laramie ID' <[REDACTED]@[REDACTED]> 'gering-ft laramie ID #2' <[REDACTED]@[REDACTED]> 'Grant Ward' <grant@msidd.com>; 'Ivan Ray' <ivanr@davisweber.org>; 'James Broderick' <jwb@secwcd.com>; Jason Peltier <jason.peltier@sldmwa.org>; Jason Phillips <jphillips@friantwater.org>; 'Jeff Sutton' <jsutton@tccanal.com>; 'Joe Rutledge' <joe.rutledge@tvid.org>; 'Ken Curtis' <kcurtis@frontier.net>; 'Larry Bauman' <lbauman@cvpwater.org>; 'Larry Hicks' <lsrcd@yahoo.com>; 'Mark Atlas' <matlas@jmatlaslaw.com>; 'Matt Harris' <[REDACTED]@[REDACTED]> Matt Lukasiewicz <[REDACTED]@[REDACTED]> Mike Britton <mbritton@northunitid.com>; 'Mike LaPlant' <[REDACTED]@[REDACTED]> 'Natasha Montgomery' <nmontgomery@sidwater.org>; 'Norm Haak' <[REDACTED]@[REDACTED]> 'Norm Semanko' <norm@iwua.org>; 'North Platte Irrigators' <[REDACTED]@[REDACTED]> Ortega, Antonio <AOrtega@IID.com>; 'Pat Riley' <[REDACTED]@[REDACTED]> 'Paul Orme' <[REDACTED]@[REDACTED]> 'Rebecca Davidson' <[REDACTED]@[REDACTED]> 'Richard Moss' <RMoss@ppeng.com>; Rusty Jardine <rusty@tcid.org>; 'Sheldon Jones' <sheldon@farmfoundation.org>; Shields, Tina L <tshields@IID.com>; 'Steve Benson' <swbenson@iid.com>; 'Tom Davis' <tdavis@ycwua.org>; Tom Knutson <[REDACTED]@[REDACTED]> 'Tom Myrum' <tmyrum@wsra.org>; 'Wade Noble' <wade@noblelaw.com>; Bill Kennedy <[REDACTED]@[REDACTED]> 'Chris Hurd' <[REDACTED]@[REDACTED]> [REDACTED] <[REDACTED]@[REDACTED]> 'Don Schwandt' <[REDACTED]@[REDACTED]> 'Harold Mohlman' <[REDACTED]@[REDACTED]> 'Harvey Bailey' <[REDACTED]@[REDACTED]> Marc Thalacker <manager@tsidweb.org>; 'Pat O'Toole' <[REDACTED]@[REDACTED]> 'Ron Rayner' <[REDACTED]@[REDACTED]> 'Sandy Denn' <[REDACTED]@[REDACTED]> 'Tom Schwarz' <[REDACTED]@[REDACTED]>
Cc: 'Gary Sawyers' <gws@bolenfransen.com>; 'Mark Limbaugh' <mlimbaugh@tfgnet.com>; Ara Azhderian <ara.azhderian@sldmwa.org>; 'Susan Ramos' <sramos@westlandswater.org>; 'Jane Townsend' <[REDACTED]@[REDACTED]> 'Chris Dahlstrom' <cdahlstrom@syrwd.org>; 'David Orth' <dorth@davidorthconsulting.com>; 'Dan Vink' <dvink@svwater.org>; 'Jim Magagna' <Jim@wysga.org>; 'Sara Cornell' <[REDACTED]@[REDACTED]> [REDACTED] <[REDACTED]@[REDACTED]> urban@krdistrict.org; 'John Stuhlmiller' <JStuhlmiller@wsfb.com>; scott@kwua.org
Subject: Drought Letter

Dear Alliance Directors, Advisory Committee Members, and Associates:

Attached please find a letter from over 100 organizations across the Western United States urging the Senate Energy and Natural Resources (ENR) Committee to take action on the drought. The organizations are a combination of agricultural and water districts from each of the Western states who have come together. Please note that we are also transmitting this letter to not only the other ENR Committee Members but also every Western state Senate office.

I greatly appreciate the hard work that many of you put into this effort. Thank you.

Please share this letter with those parties whose permission you helped secure to be included as signatories, and extend our thanks to them.

Again, thank you for your continued attention to this matter.

Sincerely,

Dan Keppen
Executive Director
Family Farm Alliance

March 14, 2016

The Honorable Lisa Murkowski
Chairwoman
Senate Energy & Natural Resources
Committee
304 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Maria Cantwell
Ranking Member
Senate Energy & Natural Resources
Committee
304 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairwoman Murkowski, Ranking Member Cantwell, and Members of the Committee:

During October 2015, we the undersigned wrote to you to express our collective thanks for the work that your Committee had undertaken to explore the underlying issues and the legislative solutions that could help remedy a prolonged Western drought. We wrote on behalf of the thousands of Western farmers, ranchers and businesses we represent, as well as the millions of urban, suburban and rural residents that benefit from water supplies collectively delivered to them by our organizations, urging you to work toward bipartisan legislation that can be passed by both the Senate and the House, and signed into law by the President this year to help in the short, medium and long-term drought we all have experienced and currently face in the Western United States.

We write to you today to urge you to finish the good work that the Committee has started and ask that you move forward bipartisan Western water and drought relief legislation during 2016. The Committee can draw upon a strong foundation to create this legislation. Over the course of last year, your Committee considered a multitude of bills that would address short, medium and long-term aspects of the drought, both on a West-wide as well as state specific scale. We believe that now is the time to act!

While several Western states are currently experiencing decent moisture due to El Nino rains or heavy snowpack, none of us have forgotten the daunting water challenges that we recently faced. Since 2000, the Colorado River Basin has experienced the driest 16-year period in over 100 years of historical natural flows and one of the most severe droughts in the last 1,200 years. California also experienced their worst drought since the 13th century and drought conditions in Washington State were, according to the state, “unlike any we’ve ever experienced.” Additionally, Western drought has exacerbated already declining forest health, further increasing the risk and severity of devastating mega fire that can threaten the origin of water supplies for millions in the West.

In fact, a study published in early February 2016 in the journal *Geophysical Research Letters* argues that the storms that routinely bring rain to all the Southwestern United States are becoming rarer and rarer with drier conditions the new normal. Whether this one study is true or

not, we all know that one year of heavy rain in California or dense snowpack in the Rockies may catch the attention of the news media, but does not solve the drought so simply. As we indicated in October, we want Congress to pass federal legislation and we must see Congress act this year in order to begin the process of modernizing our Western water systems to help us meet future hydrologic challenges.

In order to respond to current and future water shortages, Congress must provide federal agencies with more flexibility under existing environmental laws and regulations to encourage a more cooperative approach toward achieving multiple goals. And, where such flexibility currently exists in law, Congress should demand that agencies use those flexibilities to act with the urgency and promptness that this drought crisis demands.

Western water legislation must also move toward an approach that encourages cooperation and innovation to produce better results for both agriculture and the environment. This includes promoting the use of new technology in water and species management. Real-time monitoring and data collection can be used to more closely align water supply operations to actual fishery and environmental needs.

As a nation we must invest (and reinvest) in the Western water infrastructure necessary to meet current and future demands. Our existing water infrastructure in the West is aging and in need of rehabilitation. We need new water storage in order to adapt to a changing hydrology and develop usable and sustainable supplies to meet growing demands for water. As part of this effort, legislation streamlining federal permitting processes and regulatory agency alignment will help increase new water storage and improve water management. The federal government can continue to be a partner in solving these water problems in the West by using new federally backed financing mechanisms that have a very low cost to the Treasury and make water resource investments more attractive and affordable for non-federal interests.

We believe the Committee can bring these ideas together and pass Western drought legislation this Congress. We ask that all Western Senators work collaboratively to move these ideas through the Senate floor. While election years bring political challenges, our collective objective is for a bicameral product to be signed into law before the end of the year. We ask for your help to ensure that Western water users have every tool available to survive and recover from the current drought and to prepare for the hard, dry years that the future may hold.

We continue to stand ready to assist you in this effort to pass bipartisan legislation that can bring the tools needed to help us find solutions that work for the water supply future of all of our communities in the arid West.

Sincerely,

National and Regional Organizations

- American Farm Bureau Federation
- Family Farm Alliance
- Klamath Water Users Association
- National Cattlemen's Beef Association
- National Onion Association
- National Potato Council
- Public Lands Council
- United Fresh Produce Association
- Western Agricultural Processors Association
- Western Growers Association
- Western Plant Health Association

Arizona

- Agribusiness & Water Council of Arizona
- Arizona Cotton Growers Association
- Arizona Farm Bureau
- Arizona Westside Districts
- Salt River Project
- San Carlos Irrigation and Drainage District
- United Dairymen of Arizona
- Wellton-Mohawk Irrigation and Drainage District
- Yuma-Mesa Irrigation and Drainage District

California

- Agricultural Council of California
- Almond Hullers and Processors Association
- Association of California Egg Farmers
- Association of California Water Agencies
- California Agricultural Irrigation Association
- California Alfalfa & Forage Association
- California Cotton Alliance
- California Association of Wheat Growers
- California Association of Winegrape Growers
- California Bean Shippers Association
- California Cattlemen
- California Chamber of Commerce
- California Citrus Mutual
- California Cotton Ginners Association
- California Cotton Growers Association
- California Farm Bureau Federation
- California Forestry Association
- California Fresh Fruit Association
- California Grain and Feed Association
- California League of Food Processors
- California Pear Growers Association
- California Seed Association
- California State Floral Association
- California Warehouse Association

California Women for Agriculture
Central Valley Project Water Association
Friant North Authority
Friant Water Authority
Glenn-Colusa Irrigation District
Imperial Irrigation District
Northern California Water Association
Pacific Egg & Poultry Association
San Joaquin River Exchange Contractors Water Authority
San Luis & Delta-Mendota Water Authority
Santa Ynez River Water Conservation District, ID No.1
South Valley Water Association
Tehama-Colusa Canal Authority
Valley Ag Water Coalition
Westlands Water District

Colorado

Colorado Farm Bureau
Colorado Fruit and Vegetable Growers Association
Colorado Onion Growers Association
Dolores Water Conservancy District

Idaho

Idaho Council on Industry and the Environment
Idaho Farm Bureau
Idaho Grain Producers Association
Idaho Water Users Association

Montana

Montana Farm Bureau

Nebraska

Nebraska Water Users Association

Nevada

Nevada Farm Bureau

New Mexico

Elephant Butte Irrigation District
New Mexico Farm Bureau

Oregon

Deschutes Basin Board of Control
Oregon Association of Nurseries
Oregon Cattlemen's Association
Oregon Farm Bureau
Oregon Seed Council
Oregon Water Resources Congress
Oregonians for Food and Shelter

Utah

Davis and Weber Counties Canal Company
North Ogden Irrigation Company
Ogden River Water Rights Association
Ogden River Water Users' Association
South Ogden Conservation District

Utah Farm Bureau
Utah Water Conservancy District
Utah Water Users Association
Weber-Box Elder Conservation District
Weber River Water Users Association

Washington

Columbia Basin Development League
Kittitas Reclamation District
Roza Irrigation District
Washington Asparagus Commission
Washington Blueberry Commission
Washington Farm Bureau
Washington Red Raspberry Commission
Washington State Potato Commission
Washington State Water Resources Association
Yakima Basin Joint Board

Wyoming

Wyoming Farm Bureau
Wyoming Stock Growers Association
Little Snake River Conservation District
Savery-Little Snake Water Conservancy District

cc:

Senator John McCain
Senator Barbara Boxer
Senator Dianne Feinstein
Senator Michael Bennett
Senator Michael Crapo
Senator Jon Tester
Senator Dean Heller
Senator Harry Reid
Senator Tom Udall
Senator Jeff Merkley
Senator Orrin Hatch
Senator Patty Murray
Senator Michael Enzi

From: Tom Birmingham

Sent: Thursday, March 17, 2016 11:44 AM

To: 'Watts, John (Feinstein)'; 'Rooney, Kenneth (Feinstein)'; 'Petersen, Scott'; 'Lombardi, Kyle'; 'Rojewski, Cole'; Caitlin.Shannon@mail.house.gov

CC: 'Abajian, Shelly (Feinstein)'; 'Johnny Amaral'; 'David Bernhardt'; 'Denny Rehberg'; 'Dennis Cardoza'

Subject: FW: SWC and SL&DMWA Recommendations for the week of March 14, 2016.

Lady and Gentlemen:

The following is a response from David Murillo to Jason Peltier, the Executive Director of the San Luis & Delta-Mendota Water Authority, and Terry Erlewine, the General Manager of the State Water Contractors, regarding a proposed operation in light of the significant precipitation events during the first part of this month. David's response, which merely relates the fishery agencies' response, speaks for itself.

However, to put this response in context, please consider Delta inflow for a mere three days this week, March 14, March 15, and March 16. On those three days, the Bureau of Reclamation's preliminary calculations of Delta inflow were 117, 846 cfs, 145,007 cfs, and 150,807 cfs, respectively. That means over a three day period, Delta inflow was in excess of 826,906 acre-feet. That three day inflow is more than the Jones Pumping Plant pumped during the entire 2015 water year (695,655 acre-feet).

The fishery agencies maintain that under existing law they do not have the discretion to permit the operations proposed by the Authority and the State Water Contractors. That is precisely why we need immediate action on legislation; to give the agencies the discretion they assert they do not have.

Tom

From: Murillo, David [<mailto:dmurillo@usbr.gov>]

Sent: Thursday, March 17, 2016 8:53 AM

To: Terry Erlewine <TERlewine@swc.org>; jpeltier@westlandswater.org

Cc: mcowin@water.ca.gov; (Ren_Lohoefener@fws.gov) <Ren_Lohoefener@fws.gov>; Torgersen, Carl@DWR <Carl.Torgersen@water.ca.gov>; leahigh@water.ca.gov; RMILLIGAN@usbr.gov; Castleberry, Dan@fws <Dan_Castleberry@fws.gov>; Ara Azhderian <ara.azhderian@sldmwa.org>; Brent Walthall <bwalthall@kcwa.com>; sarakawa@mwdh2o.com

Subject: Re: SWC and SL&DMWA Recommendations for the week of March 14, 2016.

Terry/Jason, Based on discussions with FWS and NMFS, we will not be able to implement this recommendation. Both FWS and NMFS have stated that the RPA requirements in the their BOs do not allow them the discretion to permit -6,000 OMR as the overall target at this time. From their perspective, concerns regarding juvenile winter-run salmon and juvenile delta smelt remain elevated. Reinitiation of formal consultation with NMFS and FWS to request changes to the RPA requirements would be required to make any change and both agencies have indicated it would be unlikely that they would be able to allow this type of a change given the status of the species.

Thanks

David G. Murillo

Bureau Of Reclamation

Mid Pacific Regional Director

Office # [916-978-5000](tel:916-978-5000)

On Mon, Mar 14, 2016 at 2:26 PM, Terry Erlewine <TErlewine@swc.org> wrote:

Messers Cowin, Murillo, Loehefner, Castleberry, Milligan, Torgersen and Lehigh:

For the week of March 14, 2016 the State Water Contractors and the San Luis & Delta-Mendota Water Authority recommend that pumping at the Banks and Jones pumping plants be maintained at levels that result in an OMR flowrate of -6,000 cfs based on the indexed value. The exceptionally large flows now occurring require immediate action to increase pumping. Our review and analysis of current monitoring data described below supports this recommendation.

Smelt

1. Salvage of zero Delta smelt during the past 21 days at the pumps. Smelt have not been captured at Jersey Point or Prisoners Point in 120 Trawls since February 25th.
2. Zero Delta smelt have been captured in 150 trawls at station 902 in the south Delta
3. Recent increases in inflow have not increased turbidity within the South Delta. Holland Cut and Old River at Bacon Island remain below 8, significantly below levels of concern for adult, spawning Delta smelt.
4. Delta Smelt distributions during the spawning period to date remain in the Northern Arc between Cache Slough and Suisun Bay, keeping the likelihood of larval entrainment very low and reducing the need of larval protective measures during this week. Increasing flows on the San Joaquin River and dramatic increases in QWEST also reduce the likelihood of entrainment

into the South Delta caused by an increase in pumping to -6,000. The larval survey has yet to capture any Delta smelt at any station.

Salmon

1. Salvage of just 0 wild winter run since February 22, and just two hatchery winter run in the past 8 days.
2. Wild non-clipped is at 1.1% of ITL. Hatchery/clipped is at 0.6% of ITL
3. Prior salvage events were minor and mainly limited to specific hatchery releases. Those fish have likely exited the system.
4. Monitoring indicates that out-migrants are in the Sacramento and San Joaquin rivers. And very limited number of individuals in the South Delta (see attached map).
5. Recent scientific findings supported by your agencies show that is “little or no effect of exports on SJR and Sac R flow or velocity”
6. The NMFS analysis of OMR and salmon salvage provides no indication that -5,000 cfs OMR is more protective than a more negative OMR.

Based on the methodology used to develop the salmon RPAs and the associated ITLs we think the RPAs provide sufficient latitude to increase pumping to -6,000 cfs. In January and February the your agencies decreased pumping due to take that was significantly below allowable levels in reliance on the agencies view that the BiOps are flexible and exercised that flexibility to reduce pumping. Under the current conditions in the Delta the agencies should exercise the same flexibility to increase pumping unless salmonid take increases. If increased pumping under the BiOps requires an exchange of letters between the regulatory agencies and the action agencies that exchange should be expedited to allow capture of the current high flows. We agree that continued close monitoring of the salmon ITLs (particularly the Spring Run surrogate ITL) is warranted and that additional salvage may necessitate reducing pumping back to -5,000 if those ITLs are met.

The transfer window was extended last year and should be extended again this year. The agencies should expedite the process of approving a 1:1 ratio for transfer water from the San Joaquin River with an extension of the transfer window until mid-November.

Based on our analysis of the above data combined with forecasted conditions we recommend that pumping be set at levels that achieve a -6,000 cfs OMR until such time as there is significant and sustained increases in turbidity, or increased salmonid salvage unassociated with hatchery releases.

Thank you,

Terry Erlewine

Jason Peltier

General Manager

General Manager

State Water Contractors

San Luis & Delta-Mendota Water Authority

From: Rojewski, Cole
Sent: Thursday, March 17, 2016 2:02 PM
To: Johnny Amaral; David L. Bernhardt
Subject: Settlement

Northern agreement settled yet? Any word on letter from interior?

Cole

From: Johnny Amaral
Sent: Thursday, March 17, 2016 2:19 PM
To: 'Rojewski, Cole'; 'David L. Bernhardt'
Subject: RE: Settlement

Northerly settlement agreed to. Waiting on Interior letter still

-----Original Message-----

From: Rojewski, Cole [<mailto:Cole.Rojewski@mail.house.gov>]
Sent: Thursday, March 17, 2016 2:02 PM
To: Johnny Amaral; David L. Bernhardt
Subject: Settlement

Northern agreement settled yet? Any word on letter from interior?

Cole

From: Bernhardt, David L.
Sent: Thursday, March 17, 2016 2:20 PM
To: 'Rojewski, Cole'; Johnny Amaral
Subject: RE: Settlement

It's my understanding they have reached an agreement, but the Government has not finalized. I think we will get the letter very soon.

David

-----Original Message-----

From: Rojewski, Cole [<mailto:Cole.Rojewski@mail.house.gov>]
Sent: Thursday, March 17, 2016 5:02 PM
To: Johnny Amaral; Bernhardt, David L.
Subject: Settlement

Northern agreement settled yet? Any word on letter from interior?

Cole

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From: Rojewski, Cole
Sent: Thursday, March 17, 2016 2:21 PM
To: Bernhardt, David L.
CC: Johnny Amaral
Subject: Re: Settlement

House thinks it's possible to do hearing in April if possible.

> On Mar 17, 2016, at 5:19 PM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

>

> It's my understanding they have reached an agreement, but the Government has not finalized. I think we will get the letter very soon.

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> From: Rojewski, Cole [<mailto:Cole.Rojewski@mail.house.gov>]

> Sent: Thursday, March 17, 2016 5:02 PM

> To: Johnny Amaral; Bernhardt, David L.

> Subject: Settlement

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From: Bernhardt, David L.
Sent: Thursday, March 17, 2016 2:24 PM
To: Rojewski, Cole
CC: Johnny Amaral
Subject: Re: Settlement

We would like to see that happen.

David Bernhardt

> On Mar 17, 2016, at 5:21 PM, Rojewski, Cole <Cole.Rojewski@mail.house.gov> wrote:

>

> House thinks it's possible to do hearing in April if possible.

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>> Sent: Thursday, March 17, 2016 5:02 PM

>> To: Johnny Amaral; Bernhardt, David L.

>> Subject: Settlement

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From: Rojewski, Cole
Sent: Sunday, March 20, 2016 8:54 AM
To: 'Bernhardt, David L.'
CC: Johnny Amaral
Subject: RE: Settlement

Committee seems to be hearing that gov will be finalizing settlement soon. Let's touch base middle of next week and figure things out.

-----Original Message-----

From: Bernhardt, David L. [<mailto:DBernhardt@BHFS.com>]
Sent: Thursday, March 17, 2016 5:24 PM
To: Rojewski, Cole
Cc: Johnny Amaral
Subject: Re: Settlement

We would like to see that happen.

David Bernhardt

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>> To: Johnny Amaral; Bernhardt, David L.

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From: Bernhardt, David L.
Sent: Sunday, March 20, 2016 8:55 AM
To: 'Rojewski, Cole'
CC: Johnny Amaral
Subject: RE: Settlement

Cole: It is very close to done, but the paperwork on the Government's side takes a while. We can certainly touch base next week.

David

-----Original Message-----

From: Rojewski, Cole [<mailto:Cole.Rojewski@mail.house.gov>]
Sent: Sunday, March 20, 2016 11:54 AM
To: Bernhardt, David L.
Cc: Johnny Amaral
Subject: RE: Settlement

Committee seems to be hearing that gov will be finalizing settlement soon. Let's touch base middle of next week and figure things out.

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Sent: Thursday, March 17, 2016 5:24 PM
To: Rojewski, Cole
Cc: Johnny Amaral
Subject: Re: Settlement

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David Bernhardt

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>> Sent: Thursday, March 17, 2016 5:02 PM

>> To: Johnny Amaral; Bernhardt, David L.

>> Subject: Settlement

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From: Johnny Amaral

Sent: Monday, March 21, 2016 6:30 AM

To: Mike Burns; Ed Manning; Carolyn Jensen; David Bernhardt; Denny Rehberg; Dennis Cardoza; Catherine Karen; Ryan A. ' 'Smith

Subject: Hopefully this is the last time this will happen

I'm giving a CVP aerial tour to a team of reporters today. Will be with them from 8:30 am to 2:30 pm.

So, we need to postpone our call. Any conflicts doing the call at the exact same time on Tuesday?

Best,

Johnny Amaral

From: DCardoza@foley.com

Sent: Monday, March 21, 2016 7:35 AM

To: Johnny Amaral

CC: Mike Burns; Ed Manning; Carolyn Jensen; David Bernhardt; Denny Rehberg; Catherine Karen; Ryan A. 'Smith

Subject: Re: Hopefully this is the last time this will happen

I am delivering a speech at that time. 1-2pm Eastern. Sorry. D

Sent from my iPhone

> On Mar 21, 2016, at 9:29 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

>

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> Johnny Amaral

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From: Michael Burns

Sent: Monday, March 21, 2016 9:35 AM

To: 'DCardoza@foley.com'; Johnny Amaral

CC: Ed Manning; Carolyn Jensen; David Bernhardt; Denny Rehberg; Catherine Karen; Ryan A. 'Smith

Subject: RE: Hopefully this is the last time this will happen

KP can have our CA call at the same time.

Michael Burns

KP P U B L I C A F F A I R S

1201 K Street, Suite 800, Sacramento, CA 95814

p. 916.448.2162 m. 916.600.1271 f. 916.448.4923

w. www.ka-pow.com e. mburns@ka-pow.com

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-----Original Message-----

From: DCardoza@foley.com [<mailto:DCardoza@foley.com>]

Sent: Monday, March 21, 2016 7:35 AM

To: Johnny Amaral

Cc: Michael Burns; Ed Manning; Carolyn Jensen; David Bernhardt; Denny Rehberg; Catherine Karen; Ryan A. 'Smith

Subject: Re: Hopefully this is the last time this will happen

I am delivering a speech at that time. 1-2pm Eastern. Sorry. D

Sent from my iPhone

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> Johnny Amaral

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From: Karen, Catherine
Sent: Monday, March 21, 2016 10:11 AM
To: Johnny Amaral; Mike Burns; Ed Manning; Carolyn Jensen; David Bernhardt; Denny Rehberg; Dennis Cardoza; Ryan A. 'Smith
Subject: RE: Hopefully this is the last time this will happen

I can although will be in transit.

From: Johnny Amaral
Sent: Monday, March 21, 2016 08:29:31 AM
To: Mike Burns; Ed Manning; Carolyn Jensen; David Bernhardt; Denny Rehberg; Dennis Cardoza; Karen, Catherine; Ryan A. 'Smith
Subject: Hopefully this is the last time this will happen

I'm giving a CVP aerial tour to a team of reporters today. Will be with them from 8:30 am to 2:30 pm.

So, we need to postpone our call. Any conflicts doing the call at the exact same time on Tuesday?

Best,

Johnny Amaral

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From: Smith, Ryan A.
Sent: Monday, March 21, 2016 10:16 AM
To: Karen, Catherine
CC: Johnny Amaral; Mike Burns; Ed Manning; Carolyn Jensen; Bernhardt, David L.; Denny Rehberg; Dennis Cardoza
Subject: Re: Hopefully this is the last time this will happen

I can be available

Sent from my iPhone

On Mar 21, 2016, at 1:11 PM, Karen, Catherine <ckaren@sidley.com> wrote:

I can although will be in transit.

From: Johnny Amaral
Sent: Monday, March 21, 2016 08:29:31 AM
To: Mike Burns; Ed Manning; Carolyn Jensen; David Bernhardt; Denny Rehberg; Dennis Cardoza; Karen, Catherine; Ryan A. 'Smith
Subject: Hopefully this is the last time this will happen

I'm giving a CVP aerial tour to a team of reporters today. Will be with them from 8:30 am to 2:30 pm.

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Johnny Amaral

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From: Denny Rehberg

Sent: Monday, March 21, 2016 2:43 PM

To: Johnny Amaral

CC: Mike Burns; Ed Manning; Carolyn Jensen; David Bernhardt; Dennis Cardoza; Catherine Karen; Ryan A. 'Smith

Subject: Re: Hopefully this is the last time this will happen

I can make it work.

> On Mar 21, 2016, at 7:29 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

>

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>

> So, we need to postpone our call. Any conflicts doing the call at the exact same time on Tuesday?

>

> Best,

>

> Johnny Amaral

>

>

.....
Mercury.

Denny Rehberg

Co-Chairman

(US Congressman 2001-2013)

The Portrait Building

701 8th Street NW | Suite 650

Washington, DC | 20001

202.261.4000 office | [REDACTED] mobile

www.mercuryllc.com

From: Bernhardt, David L.

Sent: Monday, March 21, 2016 3:17 PM

To: Denny Rehberg

CC: Johnny Amaral; Mike Burns; Ed Manning; Carolyn Jensen; Dennis Cardoza; Catherine Karen; Smith, Ryan A.

Subject: Re: Hopefully this is the last time this will happen

I can too.

David Bernhardt

On Mar 21, 2016, at 5:44 PM, Denny Rehberg <DRehberg@mercuryllc.com> wrote:

I can make it work.

> On Mar 21, 2016, at 7:29 AM, Johnny Amaral <jamara1@westlandswater.org> wrote:

>

>

> I'm giving a CVP aerial tour to a team of reporters today. Will be with them from 8:30 am to 2:30 pm.

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> Johnny Amaral

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.....

<image55bf91.JPG>

Denny Rehberg

Co-Chairman

(US Congressman 2001-2013)

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701 8th Street NW | Suite 650

Washington, DC | 20001

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From: Bernhardt, David L.
Sent: Friday, March 25, 2016 9:10 AM
To: Johnny Amaral
Subject: Fwd: Mar 25, 2016 CVP Ops Update

FYI

From: Murillo, David <dmurillo@usbr.gov>
Sent: Friday, March 25, 2016 11:57 AM
To: grant.kerr@mail.house.gov; Eastman, Kevin; Esquivel, Joaquin@CNRA; Chapman, Kyle (Boxer); Clement, Anne (Boxer); Watts, John (Feinstein); Peterson, James (Feinstein); logan.ferree@mail.house.gov; Miller, Ben; emily.burns; Durst, Garrett; Tudor, Chris; Brittan Specht; Badmington, Casey; Victor, Kyle; Silvers, Jacqueline; Obermiller, Chad; Frison, Teresa; Arness, Patrick; Larrabee, Jason; betsy.arnold; Ken Degraff (Pelosi); Amador, Adela; Edmonson, Robert; miriam.goldstein; Warren, Samantha; Scott Petersen; Werwa, Eric; Murphy, Hannah; angela.ebinger@mail.house.gov; Troy Phillips; Nelson, Damon; Kyle Lombardi; eliot.crafton@mail.house.gov; david.orosco; Fundakowski, Jean; Wolcott, Kirk; Franco, Miguel; Don MacDonald; sarah.weinstein@mail.house.gov; Joe.Sheehy@mail.house.gov; andrew.lachman; Hurley, Amanda; Kiedrowicz, Melissa; jeff.sanchez@mail.house.gov; Castillo, Victor; Steinberger, Julia; Foley, Ian; Sengstock, Kathleen; Saroff, Laurie; Helfrich, Devin; Vanderslice, Jeff; tyler.grimm@mail.house.gov; Allen, Aaron; Steuer, Lee; Weaver, Kiel; Kearney, Christopher (Energy); Brooks, David (Energy); Muirragui, Matthew; Betsy Cody; Sunny Snyder; Megan Kelhart; Jeremy Bratt; Dionne Thompson; Jeffrey Rieker; Bauserman, Trent; Camille (Calimlim) Touton; Wheeler Mathews, Katie; Mathew Maucieri; Shane Hunt; PABLO ARROYAVE; Rooney, Kenneth (Feinstein); Stansbury, Melanie (Energy); Najera, Alesandra (Boxer); Chris.White@mail.house.gov; emlyn.struthers; emma.mehrabi@mail.house.gov; andrew.ginsburg@mail.house.gov; paul.beck@mail.house.gov; sonali.desai@mail.house.gov; joe.jankiewicz@mail.house.gov; Becky Cornell; johanna.montiel@mail.house.gov; blair.rotert@mail.house.gov; adam.sachs@mail.house.gov; Viall, Claire; yvette.wissmann@mail.house.gov; lorenzo.rubalcava@mail.house.gov; tim.carlton@mail.house.gov; kc.jaski@mail.house.gov; matt.weiner@mail.house.gov; Ann Adler; Christina Durham - NOAA Federal; Alyssa Hausman; meridith.sebring@mail.house.gov; tim.itnyre@mail.house.gov; laurie.chong@mail.house.gov; Dunklin, Kristina; Michelle Banonis; Alicia Forsythe
Subject: Mar 25, 2016 CVP Ops Update

To all, I received a determination from the FWS that determines that Old and Middle River (OMR) flow should be no more negative than -2500 cfs on a 14-day running average, with a simultaneous 5-day running average no more negative than -3125 cfs (within 25 percent).

Rationale: Given current Delta conditions, the historical low abundance of Delta Smelt, the presence of a spent female in spring Kodiak trawl survey #3 and confirmed presence of larval Delta Smelt in the San Joaquin River at Prisoner's Point (Station 815) and at Medford Island (Station 906) in smelt larval survey (SLS) #6, the Service determines OMR flow should be no more negative than -2500 cfs on a 14-day running average, with a simultaneous 5-day running average no more negative than -3125 cfs (within 25 percent). Presence of adults in spawning condition in the early warning survey throughout the month of February and water temperatures consistent with spawning and hatching in the Delta since early February indicate potentially persistent presence of the early life-history stages of Delta Smelt in a region vulnerable to entrainment at more negative OMR flows. Early life

history stages of Delta Smelt are more vulnerable to entrainment as they behave more like particles. Particle tracking modeling indicates that maintaining OMR flow of no more negative than -2500 cfs would be more protective of areas subject to entrainment. SLS #6 confirmed the presence of larval Delta Smelt in other areas of the Delta not subject to entrainment, and for that reason the Service believes OMR flow more positive than -2500 cfs is not necessary for protection of Delta Smelt at this time. However, given the depressed abundance of Delta Smelt and the importance of the larval and juvenile life stage, we believe OMR flow more protective than -3500 cfs is warranted. Sacramento River flow at Freeport is expected to remain around 50,000 cfs on average through the end of March. Larval and juvenile Delta Smelt will be able to realize the benefits of the more favorable hydrology with the decrease in negative OMR flow.

The entire determination can be viewed on the FWS website.

If you have any questions please let me know.

Thanks

*David G. Murillo
Bureau Of Reclamation
Mid Pacific Regional Director
Office # 916-978-5000*

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From: Johnny Amaral

Sent: Monday, March 28, 2016 8:33 AM

To: Mike Burns; Ed Manning; Carolyn Jensen; Dennis Cardoza; Ryan A. ' 'Smith; Denny Rehberg; David Bernhardt; Catherine Karen

Subject: Surprise surprise

I just got pulled into a Landholder Comittee meeting in the office. No call today.

Mike Burns...I will call you later today when this is all over.

Best,

Johnny Amaral

From: Karen Clark

Sent: Friday, April 1, 2016 10:42 AM

To: 'Alison MacLeod'; 'Carmela McHenry'; 'Carolyn Jensen'; Catherine Karen; Dan Pope; 'David Bernhardt'; Dennis Cardoza; Denny Rehberg; 'Ed Manning'; Emily Lynn Smith; 'Gayle Holman'; Jennifer Walsh; Johnny Amaral; 'Mike Burns'; Pamela Russell; Sheila Greene; 'Susan Ramos'

Subject: Statement of Westlands Water District on Reclamation's Allocation



Westlands Water District

3130 N. Fresno Street, P.O. Box 6056, Fresno, California 93703-6056, (559) 224-1523, FAX (559) 241-6277

PRESS RELEASE

April 1, 2016

**For Immediate
Release**

Contact: Gayle
Holman

(559) 905-6736
Westlands Water
District

Statement of Westlands Water District on Bureau of Reclamation's Allocation Announcement

FRESNO, CA - Despite above average runoff into the Sacramento-San Joaquin Rivers Delta and near average snowpack in the northern Sierra Nevada this year, farmers on the westside of the San Joaquin Valley, from Tracy to Kettleman City, will suffer from grossly inadequate water supplies from the Central Valley Project. Although the Bureau of Reclamation's announcement that these farmers will receive a 5% allocation is certainly better than zero allocation they received in 2014 and 2015, today's allocation announcement clearly illustrates the degree to which the once-lauded Central Valley Project is broken.

It may be difficult for some people to understand how, in a year in which north-of-Delta Central Valley Project agricultural water service contractors receive a 100% allocation, south-of-Delta agricultural water service contractors receive only 5%. The north-of-Delta contractors are not more "senior" than south-of-Delta contractors. And the State Water Resources Control Board and federal courts have both held that area of origin laws do not give north-of-Delta contractors any priority over contractors in the Central Valley Project export service area. The discrepancy between the allocations for these two groups of contractors is simply the result of constraints imposed on the Project's Delta operations by the 2008 Delta smelt biological opinion and the 2009 salmonid biological opinion.

Since December 2015, more than 8 million acre-feet of water has flowed into the Delta, while pumping into key south-of-the Delta reservoirs has been severely limited by the 2008 biological opinion for the Delta smelt. Indeed, through January and February of 2016, the Central Valley Project Jones Pumping Plant diverted less water than in January and February of 2015, when extended drought conditions resulted in very little inflow into the Delta.

Notwithstanding Reclamation's ability to make some water available to farmers, it is likely that we will experience another year when more than 200,000 acres of prime farm land in Westlands will be fallowed. This means not only increased costs and a loss of revenue for farmers, but a loss of tens-of-thousands of farm worker and farm related jobs. In other words, despite the significant improvement in rain and snow produced by the 2016 El Nino, economic hardship will continue to plague the people who live and work on the westside of the San Joaquin Valley.

We often hear that in order to make California's water supply system work, we have to implement a "big gulp, little sip" strategy; to take advantage of periods of high flow so that additional water can be left in the Delta during dry periods. But if the first three months of 2016 were not a time when a "big gulp" could be taken, there will not exist such a time. Simply put, the rigidity imposed on operation of the Central Valley Project by the 2008 biological opinion for Delta smelt has failed our communities. But tragically, the current federal policy, which wasted more than 250 billion gallons of water into the ocean in January, February, and March, has failed to protect the species while simultaneously allowing the health of the Delta to rapidly decline.

As people, communities and agriculture try to survive this disaster, we should not forget that these decisions are affecting the consumer. Jobs and farmland will continue to be eliminated and the safest food supply grown in our nation will be compromised as local farming operations are outsourced to foreign soil.

The decisions made today will have lasting impacts on the viability, strength and resilience of our nation's most abundant, safest source of food.

Is that the legacy we want for our future generations?

###

Westlands Water District, 3130 N. Fresno Street, P.O. Box 6056, Fresno, CA 93703-6056

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From: Tom Birmingham
Sent: Tuesday, April 5, 2016 4:30 PM
To: 'Bernhardt, David L.'; 'Denny Rehberg'; 'Johnny Amaral'
CC: 'Karen Clark'
Subject: Conference Call

Gentlemen,

Are you available for a conference call on Wednesday morning, at 10:00 a.m. PDT (1:00 p.m. EDT)? I had a call today from Senator Feinstein that I would like to relate to you, and I would like to discuss how to proceed on a request she made of Westlands.

Tom

From: Johnny Amaral
Sent: Tuesday, April 5, 2016 4:50 PM
To: 'Tom Birmingham'
Subject: RE: Conference Call

I just tried calling you back. Still want to talk?

From: Tom Birmingham [mailto:tbirmingham@westlandswater.org]
Sent: Tuesday, April 5, 2016 4:30 PM
To: 'Bernhardt, David L.' <DBernhardt@BHFS.com>; 'Denny Rehberg' <DRehberg@mercuryllc.com>; 'Johnny Amaral' <jamaral@westlandswater.org>
Cc: 'Karen Clark' <kclark@westlandswater.org>
Subject: Conference Call

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Tom

From: Johnny Amaral
Sent: Tuesday, April 5, 2016 4:55 PM
To: 'Tom Birmingham'; 'Bernhardt, David L.'; 'Denny Rehberg'
CC: 'Karen Clark'
Subject: RE: Conference Call

Yes. Im available

From: Tom Birmingham [mailto:tbirmingham@westlandswater.org]
Sent: Tuesday, April 5, 2016 4:30 PM
To: 'Bernhardt, David L.' <DBernhardt@BHFS.com>; 'Denny Rehberg' <DRehberg@mercuryllc.com>; 'Johnny Amaral' <jamaral@westlandswater.org>
Cc: 'Karen Clark' <kclark@westlandswater.org>
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Tom

From: Bernhardt, David L.
Sent: Tuesday, April 5, 2016 4:57 PM
To: Tom Birmingham
CC: Denny Rehberg; Johnny Amaral; Karen Clark
Subject: Re: Conference Call

I will be available.

[REDACTED]

On Apr 5, 2016, at 7:30 PM, Tom Birmingham <tbirmingham@westlandswater.org> wrote:

Gentlemen,

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Tom

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From: Tom Birmingham
Sent: Tuesday, April 5, 2016 5:05 PM
To: 'Bernhardt, David L.'
CC: 'Denny Rehberg'; 'Johnny Amaral'; 'Karen Clark'
Subject: RE: Conference Call

Let's talk at 10:00 a.m. PDT tomorrow, April 6. Please call (800) [REDACTED] pass code [REDACTED]

Tom

From: Bernhardt, David L. [mailto:DBernhardt@BHFS.com]
Sent: Tuesday, April 5, 2016 4:57 PM
To: Tom Birmingham <tbirmingham@westlandswater.org>
Cc: Denny Rehberg <DRehberg@mercuryllc.com>; Johnny Amaral <jamaral@westlandswater.org>; Karen Clark <kclark@westlandswater.org>
Subject: Re: Conference Call

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[REDACTED]

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From: Bernhardt, David L.
Sent: Tuesday, April 5, 2016 5:26 PM
To: Tom Birmingham
CC: Denny Rehberg; Johnny Amaral; Karen Clark
Subject: Re: Conference Call

Ok

On Apr 5, 2016, at 8:05 PM, Tom Birmingham <tbirmingham@westlandswater.org> wrote:

Let's talk at 10:00 a.m. PDT tomorrow, April 6. Please call (800) [REDACTED] pass code [REDACTED]

Tom

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Sent: Tuesday, April 5, 2016 4:57 PM
To: Tom Birmingham <tbirmingham@westlandswater.org>
Cc: Denny Rehberg <DRehberg@mercuryllc.com>; Johnny Amaral <jamaral@westlandswater.org>; Karen Clark <kclark@westlandswater.org>
Subject: Re: Conference Call

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From: Tom Birmingham
Sent: Tuesday, April 5, 2016 5:27 PM
To: 'Bernhardt, David L.'
Subject: RE: Conference Call

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Sent: Tuesday, April 5, 2016 5:26 PM
To: Tom Birmingham <tbirmingham@westlandswater.org>
Cc: Denny Rehberg <DRehberg@mercuryllc.com>; Johnny Amaral <jamaral@westlandswater.org>; Karen Clark <kclark@westlandswater.org>
Subject: Re: Conference Call

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To: Tom Birmingham <tbirmingham@westlandswater.org>
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have received this email in error, please notify us immediately by calling (303)-223-1300 and delete the message. Thank you.

From: Jason Peltier
Sent: Friday, April 8, 2016 5:03 PM
To: Ara Azhderian; Johnny Amaral; Frances Mizuno; Jon Rubin; Philip Williams; Shelley Ostrowski; Tom Birmingham; David Bernhardt
Subject: Fwd: Today's Teleconference Call
Attachments: Minutes 04-08-16.docx; ATT00001.htm

Good report.

Begin forwarded message:

From: Dan Keppen <dankeppen@charter.net>
Date: April 8, 2016 at 4:55:32 PM PDT
To: Bill Kennedy <[REDACTED]@[REDACTED]> 'Chris Hurd' <[REDACTED]@[REDACTED]>
<[REDACTED]@[REDACTED]> 'Don Schwindt' <[REDACTED]@[REDACTED]> 'Harold Mohlman'
<[REDACTED]@[REDACTED]> 'Harvey Bailey' <[REDACTED]@[REDACTED]> Marc Thalacker
<manager@tsidweb.org>, 'Pat O'Toole' <[REDACTED]@[REDACTED]> 'Ron Rayner' <[REDACTED]@[REDACTED]>
'Sandy Denn' <[REDACTED]@[REDACTED]> 'Tom Schwarz' <[REDACTED]@[REDACTED]> April Snell
<aprils@owrc.org>, Bill Luce <wluce@friantwater.org>, 'Bill Plummer' <[REDACTED]@[REDACTED]> 'Brad
Wind' <bwind@ncwcd.org>, 'Bruce Whitehead' <brucew@southwesternwater.org>, 'Cary Keaten'
<ckeaten@sidwater.org>, Chanee Grant <cgrant@nmid.org>, 'Chris Udall'
<Chris@agribusinessarizona.org>, 'Chris Voight' <[REDACTED]@[REDACTED]> Clifford Searle
<[REDACTED]@[REDACTED]> 'Clinton Pline' <[REDACTED]@[REDACTED]> Dale Swensen <[REDACTED]@[REDACTED]>
'Daren Coon' <DCoon@nmid.org>, 'Dave Solem' <dsolem@scbid.org>, 'David Mansfield'
<[REDACTED]@[REDACTED]> 'Don Kraus' <[REDACTED]@[REDACTED]> 'Gary Esslinger' <gesslinger@ebid-nm.org>, 'Gering Ft Laramie ID' <[REDACTED]@[REDACTED]> 'gering-ft laramie ID #2'
<[REDACTED]@[REDACTED]> 'Grant Ward' <[REDACTED]@[REDACTED]> 'Ivan Ray' <ivanr@davisweber.org>, 'James
Broderick' <jwb@secwcd.com>, Jason Peltier <jason.peltier@sldmwa.org>, Jason Phillips
<jphillips@friantwater.org>, 'Jeff Sutton' <jsutton@tccanal.com>, 'Joe Rutledge'
<joe.rutledge@tvid.org>, 'Ken Curtis' <kcurtis@frontier.net>, 'Larry Bauman' <lbauman@cvpwater.org>, 'Larry Hicks' <[REDACTED]@[REDACTED]> 'Mark Atlas' <matlas@jmatlaslaw.com>, 'Matt Harris'
<[REDACTED]@[REDACTED]> "Matt Lukasiewicz" <mluk@qwestoffice.net>, Mike Britton
<mbrampton@northunitid.com>, 'Mike LaPlant' <[REDACTED]@[REDACTED]> 'Natasha Montgomery'
<nmontgomery@sidwater.org>, 'Norm Haak' <[REDACTED]@[REDACTED]> 'Norm Semanko' <norm@iwua.org>, 'North Platte Irrigators' <[REDACTED]@[REDACTED]> "Ortega, Antonio" <AOrtega@IID.com>, 'Pat
Riley' <[REDACTED]@[REDACTED]> 'Paul Orme' <[REDACTED]@[REDACTED]> 'Rebecca Davidson'
<[REDACTED]@[REDACTED]> 'Richard Moss' <RMoss@ppeng.com>, Rusty Jardine
<rusty@tcid.org>, 'Sheldon Jones' <sheldon@farmfoundation.org>, "Shields, Tina L"
<tlshields@IID.com>, 'Steve Benson' <swbenson@iid.com>, 'Tom Davis' <tdavis@ycwua.org>, Tom
Knutson <[REDACTED]@[REDACTED]> 'Tom Myrum' <tmyrum@wswwa.org>, 'Wade Noble'
<wade@noblelaw.com>
Cc: 'Gary Sawyers' <gws@bolenfransen.com>, 'Mark Limbaugh' <mlimbaugh@tfgnet.com>, 'Ara
Azhderian' <ara.azhderian@sldmwa.org>, 'Susan Ramos' <sramos@westlandswater.org>
Subject: Today's Teleconference Call

Dear Alliance Directors and Advisory Committee Members:

Many thanks for the great participation and discussion on today's call. Attached, please find draft minutes for the call. If you have a few moments prior to our next teleconference call (Friday, May 13) to review the draft, please do so, and do not hesitate to contact me with any questions, concerns or suggested revisions.

Thanks again, and have a great weekend.

Best regards-

Dan Keppen
Executive Director



Joint Board of Directors / Advisory Committee Teleconference Meeting Minutes
April 8, 2016 12:00 p.m. PDT

Directors Present: Dan Errotabere (CALIFORNIA), Bill Kennedy (OREGON), Pat O'Toole (WYOMING), Tom Schwartz (NEBRASKA), Chris Hurd (CALIFORNIA), Ron Rayner (ARIZONA), Don Schwindt (COLORADO).

Advisory Committee Members Present: Tom Knudson (NEBRASKA), Chris Udall (ARIZONA), April Snell (OREGON), Bruce Whitehead (COLORADO), Mike Britton (OREGON), Matt Lukasiewicz (NEBRASKA), Norm Semanko (IDAHO), Sheldon Jones (ILLINOIS), Brad Wind (COLORADO), Jeff Sutton (CALIFORNIA).

Members and Contractors with Other Commitments: Paul Orme (ARIZONA), Mark Limbaugh (DC).

Others Participating: Joe Raeder (DC), Gary Sawyers (CALIFORNIA), Dan Keppen (OREGON).

Call to Order: The meeting was called to order by President O'Toole at 12:04 p.m.

Review and Approve March 2016 minutes of the board meeting and joint meeting of the board and Advisory Committee. Motion to approve the minutes: Dan Errotabere **Second:** Tom Schwartz **Action:** Approved unanimously.

Review and Approve April 2016 Financial Report –Treasurer Dan Errotabere summarized the financial report, comparing the previous year finances with the current year. Contributions are up a bit compared with last year (+\$13,800), while conference revenues are slightly lower this year. We are still waiting for the final statement from Monte Carlo. This year's expenses are a bit lower than last year, but will increase, due to adjustments made in the advocacy and executive director's compensation. The cash balance at the end of March was \$147,000; it was at \$162,000 as of yesterday. Dan and Susan Errotabere are developing reports for the state whips that will show outstanding dues receivable for the past quarter and the 4th quarter of 2015. There is still a fair amount of money that we have collected in past years that still remains outstanding in some states. Dan and Susan will schedule conference calls with the whips to address that concern.

Motion to approve the financial report: Ron Rayner **Second** Bill Kennedy

Action: Approved unanimously.

President's Report – Pat O'Toole mentioned the Alliance's involvement with the recent White House Water Summit. He has been recently contacted by federal officials on several issues, particularly regarding Endangered Species Act (ESA) matters. We have circulated an ESA questionnaire that Western Governors Association is seeking input on. There are many recent lawsuits that have been initiated regarding implementation of the ESA. While Congress might not yet be ready to tee up ESA reform, there definitely appears to be some concern with U.S. Fish and Wildlife and other Interior agencies with respect to ESA implementation. For example, increasingly, "threatened" species are being treated in the same manner as "endangered" species.

Call for Contributions to support "Big Thirst" Documentary - Pat O'Toole reported that the initial opening of "Big Thirst" will occur in the next few months in Nebraska. Pat will try to participate and represent the Alliance. The board discussed ways to support this effort, which features a strong Alliance theme.

Motion to send \$5,000 to "Big Thirst" producer, with a call for individual contributors to backstop the call with individual checks written to the Family Farm Alliance: Ron Rayner
Second Chris Hurd

Pat O'Toole will contact Conrad Weaver regarding this commitment, which will result in the Alliance being shown in the film credits as a film sponsor.

Appoint New Public Outreach Subcommittee – Dan Keppen reported that, at the February 2016 meetings with the Board of Directors and Advisory Committee members in Las Vegas, significant discussion was directed towards the need expand the Alliance's presence, particularly with regards to promoting fundraising in states outside of California. We need to aggressively work to on our involvement with recent positive developments regarding the drought, ESA and water rights as a means to generate more fundraising. The board consensus at the end of our Vegas meetings was that a subcommittee be formed to set up to deal with developing a social media and outreach strategy. Participants on the call who agreed to serve as initial members of this Subcommittee include Pat O'Toole, Dan Keppen, Chris Udall, Ryan Errotabere (Dan's son), and Tom Schwartz's daughter.

President O'Toole left the call at 12:23. Vice-President Don Schwindt took over chair responsibilities for the duration of the call.

Washington, D.C. Report – Joe Raeder reported for Mark Limbaugh, who was out of the office today. This year will see a very short Congressional session, and right now, there are fewer than 90 working days left until election, with only 60 days where the House and Senate are in session at the same time. In reality, things will need to be taken care of by mid-July. Joe noted that there is not a whole lot of productive time.

Joe discussed the appropriations process. At the start of the year, there was some hope that this process might move more smoothly than it has in the past 20 years. However, two things have changed that will likely complicate things. First, House Republicans are saying they will not vote for the budget bill, because there is too much discretionary spending. They appear intent on making sure appropriations bills do not move, which would force Congress into a Continuing Resolution. Republicans may also resist a lame duck session, which traditionally can be a very productive time to advance legislation. They fear that the lame duck might be used to advance a new omnibus appropriations package, or be used to approve President Obama's Supreme Court nominee. The Senate appropriations committee may be one of the first to move a bill, but even so, it will likely hang up on the floor. Second, this is an election year. Appropriations bills are sometimes the only thing out there that can be used to get things done, with riders to the bill. One of those riders, for example would prevent implementation of WOTUS rule, or curb implementation of Clean Air Act emissions regulations. These riders have been included in recent House bills, but have never made it through the Senate. It is difficult to keep those riders in appropriations bills.

The Senate is working now on reauthorization of the FAA program. There are many unrelated amendments, including tax break extenders that Members are trying to tack on. The House has passed an energy policy bill, and the Senate has a related bipartisan energy bill, which still has a decent chance of passing, although it is currently being held up by a few issues, including a debate over how much aid should be given to Flint, Michigan to deal with its water contamination issue. Senator Murkowski, the Chair of the Senate Energy and Natural Resources (ENR) Committee, wants to move this. A natural resources amendment is being considered that would include some things of interest to Western water users, including the Bureau of Reclamation Transparency Act, legislative language requiring Reclamation to perform and infrastructure needs assessment, the Yakima Basin plan, irrigation components of the Klamath settlement agreement, and expedited review of flood control storage manuals where local sponsors request the Corps to do that. The energy bill could pop up next week and be completed by the end of the week, but no one is sure yet what will happen.

Joe discussed Western drought legislation, which may or may not include California provisions. Western Republicans are pulling together a package of bills that could be put into a larger Western drought policy bill. Senator Feinstein reintroduced a new version of her drought bill, but no negotiations are underway on the California front. There is still a possibility that this could be put into a Western bill. Western members are looking for individual things to include, provided they can reach consensus. Given the short calendar year, the most that may happen is that the committee would approve a bill. A drought bill will not officially be dealt with by the Senate ENR committee until a policy bill clears the floor, which is where Chair Murkowski is currently focusing her efforts.

It does not appear that jurisdictional committees in the House and Senate are very enthusiastic about advancing a new Water Resources Development Act (WRDA) bill, which authorize new

Corps of Engineers studies, projects, and address policy. The last WRDA bill was signed into law in 2014.

The focus in Congress soon will be almost exclusively on budget and appropriations. Oversight hearings will be ramped up on Obama Admin initiatives (WOTUS, Clean Air regulations, mitigation policy, etc.) USFWS mitigation impacts. Whether the topics of these oversight hearings materialize into legislation remains to be seen. Between now and the end of the Congress, we will likely see much more oversight, and not so much legislation.

Dan Keppen briefly summarized the White House Water Summit, and mentioned that a barrage of related Democrat-driven materials were also released that day. Some are concerned that a Western drought white paper released by Senate ENR Committee Ranking Member Cantwell might be a signal that she does not want to engage this year on drought legislation, and will await the results of the November election.

Jeff Sutton inquired if Senator Feinstein's bill could end up as a rider to WRDA or other legislation. Joe thought that was pretty doubtful; she would need some help from Republican leadership to make that happen. He explained that Senator Murkowski's guiding principle for drought legislation is that she wants to wait until all the Republicans on her committee are in support of it. She is also hoping for a bipartisan bill. Senator Feinstein's bill might draw Republican opposition. Further discussion ensued on opportunities to conference House and Senate drought bills. It may be that Senator Murkowski moves a bill without California provisions out of committee and give the House Republicans a chance to negotiate before it goes to a Senate floor vote.

Tom Knudson asked if anyone is still talking about title transfer anymore. Joe said, no, right now no one is really talking about it, but the issue pops up every now and then. It's a "dead duck" for this Congress, but it is an idea that has attraction in other sessions. Dan and Joe discussed Alliance efforts to advance title transfer legislation in recent years. Joe thinks the issue may pick up again, maybe in the next Congress.

ESA Reform Initiative – Dan Keppen reported that we were contacted earlier this year by Western Growers Association, who shares our belief that it is critical that Congress and the Executive branch stop ignoring the burdens imposed by ESA implementation and enact common-sense reforms and modernizations to the Act. While Alliance President Pat O'Toole was in Washington, D.C. last month, he met with former Congressman Dennis Cardoza (D-CALIFORNIA) and a core group of companies and associations who intend to work together with Members of Congress on a bipartisan basis and push forward a reform agenda to make necessary and balanced improvements to the ESA. Mr. Cardoza, who helped lead the last major reform effort (now over 10 years ago), and who now works for an advocacy firm in D.C., discussed the political opportunities for this effort.

Dan reported that he had a follow-up conversation with Mr. Cardoza on this matter last week. Mr. Cardoza emphasized that, in order for reform legislation to be successful, it must be “moderate in nature, but meaningful in impact”. His firm (Foley) has selected a handful of organizations – including the Alliance -for their issue knowledge, political pragmatism, and national reach. Though additional entities will be brought on, subject to the group’s discretion, these initial parties will determine moderate legislative priorities for ESA reform and a public affairs strategy to enact ESA reform in the coming term. The members will use their collective discretion to assess the specific policy proposals the coalition will pursue, but Mr. Cardoza hopes the coalition will agree to support these general goals: 1) Eliminate “Self-Dealing” in ESA Listings; 2) Increase Transparency; and 3) Provide Stability and Consistency to Mitigation Banking.

Dan explained that, throughout 2016, as the coalition meets to determine legislative priorities and divides targeted outreach responsibilities, Foley’s lawyers will pursue extensive research into prior listing decisions. At the same time, the coalition will work cooperatively to lay the groundwork for reform. In the near term, the coalition will secure placement of favorable experts to testify in scheduled Congressional Hearings and educate targeted Members on new research. Foley’s research will also inform a Public Relations campaign, designed to complement and support legislative efforts. Many legislative vehicles are available to pursue ESA Reform, dependent on the political landscape in the new term. One option is to pursue “good governance” ESA amendments through government contracting statutes. This avenue would allow for the group to mitigate conflicts of interest in the listing process without submitting a bill to amend the text of the ESA. Other options include targeted, bipartisan ESA reform through a standalone bill, series of complementary bills, or as part of a larger legislative package.

Dan said that the coalition members will be responsible for determining the legislative vehicle, selecting specific Moderate reforms, and all additional coalition members. Foley’s role will be to perform legal research, coordinate group resources, and draw from decades of Congressional experience in ESA reform to provide political advice and policy expertise. It is Mr. Cardoza’s intent for this coalition to be member-driven, focused on attaining meaningful, moderate reforms to the ESA in

Dan believes that Mr. Cardoza is looking for ways to bring down the financial commitment for us, but to still keep others plugged in. Our goal would be to help explain the problem and what the Foley investigators come up, using the existing connections we have with Western Governors and elsewhere. They are looking to nail down commitments by the third or fourth week of this month.

After a brief discussion, the group decided that Dan would contact Mr. Cardoza and work with the coalition in that capacity, emphasizing that Alliance financial contributions would be minimal, if any.

2016 Farmer Lobbyist Trip – Possible dates for a 2016 Farmer Lobbyist trip were discussed and debated. The group decided that, because not a whole lot of substance will get done this year in Congress, and because of new administration coming in, such a trip should be scheduled near the end of the year or the beginning of 2017. In this way, we will know who will run the next Administration, and we can focus on transition education and relationship building.

Adjourn -The conference call was adjourned at 1:08 p.m. Pacific Time.

Prepared by: Dan Keppen, Executive Director and Secretary

From: Johnny Amaral
Sent: Wednesday, April 13, 2016 10:25 AM
To: Tom Birmingham
CC: David Bernhardt
Subject: Conference call

Tom,

Are you available for a call with David and I asap?

From: Tom Birmingham
Sent: Wednesday, April 13, 2016 10:26 AM
To: 'Johnny Amaral'
CC: 'David Bernhardt'
Subject: RE: Conference call

Yes. Please call (800) [REDACTED] - [REDACTED] pass code [REDACTED] at 10:30 PDT.

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
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Cc: David Bernhardt <dbernhardt@bhfs.com>
Subject: Conference call

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From: Johnny Amaral
Sent: Wednesday, April 13, 2016 10:30 AM
To: David Bernhardt
Subject: FW: Conference call

Calling in now

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Sent: Wednesday, April 13, 2016 10:26 AM
To: 'Johnny Amaral'
Cc: 'David Bernhardt'
Subject: RE: Conference call

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Sent: Wednesday, April 13, 2016 10:25 AM
To: Tom Birmingham <tbirmingham@westlandswater.org>
Cc: David Bernhardt <dbernhardt@bhfs.com>
Subject: Conference call

Tom,

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From: Johnny Amaral
Sent: Friday, April 22, 2016 12:40 PM
To: 'Rojewski, Cole'
CC: 'Dunklin, Kristina'; 'Smith, Ryan A.'; David Bernhardt
Subject: RE: Conference call on Monday

We will make Tuesday work. No problem.

Ryan or David, care to chime in here?

From: Rojewski, Cole [mailto:Cole.Rojewski@mail.house.gov]
Sent: Friday, April 22, 2016 12:28 PM
To: Johnny Amaral
Cc: Dunklin, Kristina
Subject: Re: Conference call on Monday

Let's do it Tuesday. Give us a little time to talk with committee and get things figured out.

Also now we still need the northern settlements....? Any word on them?

On Apr 22, 2016, at 12:11 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

Valadao peeps,

Now that you have gotten your response from DoI, can we do a conf call to discuss next steps on Drainage? It would be with me, Ryan Smith, and David Bernhardt and whoever you want to include on your end.

From: Bernhardt, David L.
Sent: Wednesday, April 27, 2016 10:27 AM
To: Cole Rojewski
CC: Johnny Amaral; Smith, Ryan A.
Subject: Fwd: Northerly District/Westlands and US Settlement
Attachments: 031816 Combined Draft Legislation CLEAN corrected 031816 US edits.docx; ATT00001.htm

Cole: Here is the ND district language. You received it March 23.

Best,
David

From: Rojewski, Cole [<mailto:Cole.Rojewski@mail.house.gov>]
Sent: Wednesday, March 23, 2016 12:41 PM
To: Smith, Ryan A.
Cc: Dunklin, Kristina
Subject: FW: Northerly District/Westlands and US Settlement

Thanks for sending. Kristina with our office will now be the main contact for the bill.

Thanks,

Cole

From: Smith, Ryan A. [<mailto:RSmith@BHFS.com>]
Sent: Wednesday, March 23, 2016 10:32 AM
To: Rojewski, Cole
Subject: FW: Northerly District/Westlands and US Settlement

Please use this draft and disregard the previous draft.

From: Smith, Ryan A.
Sent: Wednesday, March 23, 2016 10:29 AM
To: cole.rojewski@mail.house.gov
Cc: Bernhardt, David L.
Subject: Northerly District/Westlands and US Settlement

Cole,

Per our discussion, I have attached a negotiators draft of the San Luis Drainage Resolution Act with the completed Northerly Districts Agreement for your review. BOR has not formally approved this yet, but I understand that it is making its way through the approval process as we speak. Therefore, please hold close for now.

There have been some minor tweaks to the language that also appears in your boss's bill, which I do not believe change the legislation substantively. I would like to walk you through those changes and brief you on the settlement. To that end, please let me know if there is a good time that we can come brief you and discuss with you your thoughts on the best way to proceed.

Best,

Ryan

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REVISIONS 3/18/2016

DRAFT LEGISLATION

IN THE HOUSE OF REPRESENTATIVES

_____, __, 20__

A BILL

To affirm “The Agreement Between the United States and Westlands Water District” dated _____, “The Agreement Between the United States, San Luis Water District, Panoche Water District and Pacheco Water District” dated _____, and for other purposes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled.

SEC. 1. SHORT TITLE.

This Act may be cited as the “San Luis Unit Drainage Resolution Act.”

SEC. 2. DEFINITIONS.

In this Act:

- (a) The term “Northerly Districts Agreement” means the Agreement dated _____ between the Secretary and San Luis Water District, Panoche Water District, and Pacheco Water District;
- (b) The term “Northerly San Luis Unit Districts” means San Luis Water District, Panoche Water District, and Pacheco Water District;
- (c) The term “Project” means the Central Valley Project owned by the United States and managed by the Department of the Interior, Bureau of Reclamation;
- (d) The term “Project Water” means all water that is developed, diverted, stored, or delivered by the Secretary in accordance with the statutes authorizing the Project and in accordance with the terms and conditions of water rights acquired pursuant to California law;
- (e) The term “San Luis Act” means the Act of June 3, 1960, Public Law No. 86-488 and all Acts amendatory thereof and supplementary thereto;
- (f) The term “San Luis Unit” means those lands identified in section 1 of the Act of June 3, 1960 (Public Law 86-488, 74 Stat. 156);

- (g) As used herein, the term “San Luis Unit Contractors” means Westlands Water District (including Broadview Water District lands annexed within Westlands Water District), San Luis Water District, Panoche Water District, and Pacheco Water District;
- (h) The term “Secretary” means the Secretary of the Interior;
- (i) The term “Westlands Agreement” means the “Agreement between the United States and Westlands Water District August 2015” signed September 15, 2015.
- (j) The term “Contracting Officer” means “Contracting Officer” as that term is defined in existing San Luis Unit water service contracts.
- (k) The term “Condition of Shortage” means “Condition of Shortage” as that term is defined in existing San Luis Unit water service contracts.
- (l) As used herein, the terms “repayment contractor,” “repayment contracts,” “water service contractor,” “water service contracts,” “exchange contractor,” “exchange contracts,” “water rights settlement contractor,” “water rights settlement contracts,” “refuge contractor,” and “refuge contracts” shall have the same meanings respectively as each of those terms has in the Central Valley Project Improvement Act of 1992, Title XXXIV, 106 Stat. 4705.

SEC. 3. APPROVAL OF AGREEMENTS.

Notwithstanding any other provision of law, unless otherwise specified herein, the Secretary is hereby directed to implement the terms and conditions of the Westlands and Northerly Districts Agreements.

SEC. 4. RELIEF FROM DRAINAGE OBLIGATION.

- (a) AMENDMENTS TO THE SAN LUIS UNIT AUTHORIZATION.—The San Luis Act is amended as follows:
 - (1) In the second sentence of section 1(a) strike the words “distribution systems, drains.”
 - (2) In the sixth sentence of Section 1(a), by inserting a period following the phrase “and the terms and conditions of this Act” and striking all that follows.
 - (3) In section 5, by striking the first sentence and inserting “Notwithstanding any other provision of law, the Secretary of the Interior shall have no duty to provide drainage or drainage service to the San Luis Unit. Each contractor within the San Luis Unit that receives water for the purpose of irrigation shall be responsible for the management of drainage water within its boundaries, in accordance with Federal and California law consistent with the Agreement between the United States and Westlands Water District August 2015, signed

September 15, 20015, and Agreement dated _____ between the Secretary and San Luis Water District, Panoche Water District, and Pacheco Water District, respectively.”

(4) In the first sentence of Section 8 by striking the words “other than distribution systems and drains.”

(5) In the third sentence of Section 8, strike everything between the word “required” through and including “(b)” inserting a period following the word “unit.” Strike the remainder of the Proviso in Section 8.

SEC. 5. DRAINAGE IMPLEMENTATION.

Upon enactment of this Act, and as provided in the Westlands Agreement and Northerly Districts Agreement, each San Luis Unit Contractor shall assume all legal responsibility for the management of drainage water within its boundaries, in accordance with Federal and California law; *provided* that the Westlands Water District shall not discharge drainage water outside of its boundaries.

SEC. 6. WATER DELIVERY CONTRACTS.

(a) CONTRACT CONVERSION—The Secretary is directed to convert each San Luis Unit Contractor’s existing long-term or interim renewal water service contract entered into under section 9(e) of the Act of August 4, 1939 (53 Stat. 1196), to a repayment contract under sections 9(d) and 9(c)(1) of the Act of August 4, 1939 (53 Stat. 1195, 1194), consistent with the Westlands and Northerly Districts Agreements.

(b) Notwithstanding subsection (a) and as provided in the Westlands and Northerly Districts Agreements, the Secretary shall make allocation decisions in the Project consistent with the requirements of all current or future enacted Federal law, including, but not limited to the Federal Endangered Species Act, Reclamation law, and all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the Central Valley Project.

(1) Conversion of San Luis Unit Contractors’ contracts in subsection (a) shall not afford any San Luis Unit Contractor a greater or lesser right to an annual allocation of Project Water than that San Luis Unit Contractor had prior to the conversion of its contract under this Act.

(2) If there is a Condition of Shortage in the amount of water available for delivery to the San Luis Unit Contractors because of errors in physical operations of the Project, drought, other physical causes beyond the control of the Contracting Officer or actions taken by the Contracting Officer to meet legal obligations no liability shall accrue against the United States or any of its officers, agents or employees for any damage, direct or indirect, arising therefrom.

(c) **WATER SERVICE CONTRACT FOR LEMOORE NAVAL AIR STATION—**

- (1) The Secretary is directed to enter into a contract under section 9(e) of the Act of August 4, 1939 (53 Stat. 1196), with the Secretary of the Navy for the delivery of Project Water, to the Lemoore Naval Air Station to meet the irrigation needs of Lemoore Naval Air Station associated with air operations.
- (2) The contract amount of Project Water made available to the Lemoore Naval Air Station under this 9(e) contract entered into pursuant to paragraph (1) shall be determined by the Secretary through technical analysis with the Lemoore Naval Air Station.
- (3) In any year in which there may occur a Condition of Shortage in the amount of water available for delivery, the Contracting Officer shall allocate the available Project Water to Lemoore Naval Air Station according to the allocation steps for M&I water service contractors under the Central Valley Project M&I Water Shortage Policy (Policy) in its form on the effective date of the contract referenced in paragraph (c)(1) above for determining the amount of Project Water available for delivery to Lemoore Naval Air Station. For purposes of determining “historical use” under the Policy, Reclamation shall consider past water use for irrigation needs by the Lemoore Naval Air Station under the contract authorized by this Section, or such use previous to the contract.

SEC. 7. REPAYMENT OBLIGATIONS.

- (a) **SUSPENSION OF CAPITAL OBLIGATION—**Upon enactment of this Act, Westlands Water District’s capital repayment obligation and payments under its existing water service contracts and the April 1, 1965, repayment contract between the United States and Westlands Water District (contract numbered 14-06-200-2020-A) as further defined in subsection (d), shall be suspended until the execution of the 9(d) repayment contract referenced in section 6, and upon execution of the 9(d) repayment contract, Westlands Water District shall receive a credit against future operation and maintenance costs payable to the United States in the amount of the capital costs under the existing water service contracts and the 1965 Repayment Contract paid by Westlands between the date of the Westlands Agreement and the date of enactment of this Act.
- (b) Upon enactment of this Act, each Northerly San Luis Unit District’s capital repayment obligation and payments under its existing water service contract shall be suspended until the execution of the respective 9(d) repayment contract referenced in section 6, and upon execution of the 9(d) repayment contract, each Northerly San Luis Unit District shall receive a credit against future operation and maintenance costs payable to the United States in the amount of the capital costs under the existing water service contracts paid by that Northerly San Luis Unit District between the date of the Northerly Districts Agreements and the date of enactment of this Act.

- (c) Costs incurred by the United States for purposes of re-evaluating, planning, or providing drainage service to the San Luis Unit Contractors shall be non-reimbursable as set forth in paragraphs 9(c)(iv) and XXXXXX of the Westlands Agreement and Northerly Districts Agreement.

(d) RELIEF OF CAPITAL REPAYMENT OBLIGATIONS—

(1) Upon the date of execution of the 9(d) repayment contracts referenced in section 6(a), and as set forth in the Westlands Agreement:

(A) Westlands Water District shall be relieved of its capital repayment obligations under the June 5, 1963, water service contract between the United States and Westlands Water District (contract number 14-06-200-495-A) providing for water service, or any renewals thereof, and any water service contracts assigned to Westlands, Westlands Distribution District No. 1, and Westlands Distribution District No. 2 existing as of the date of execution of the Westlands Agreement.

(B) Westlands Water District shall be relieved of any remaining repayment obligation under the April 1, 1965, repayment contract between the United States and Westlands Water District (contract numbered 14-06-200-2020-A).

(2) Upon the date of execution of the 9(d) repayment contracts referenced in section 6(a) and as set for in the Northerly Districts Agreement, each of the Northerly San Luis Unit Districts shall be relieved of its capital repayment obligations under its long-term or interim renewal water service contracts or any renewals or conversions thereof (Panoche Water District, contract number 14-06-200-7864A-IR4; Pacheco Water District, contract number 6-07-20-W0469; and San Luis Water District, contract number 14-06-200-7773A-IR4) existing as of the date of execution of the Northerly Districts Agreements.

(3) Repayment relief granted in paragraphs b(1) and b(2) above shall not extend to the San Luis Unit Contractors' operation and maintenance obligations, whether payable to the United States or to an operating non-federal entity, or to construction costs or other capitalized costs not yet allocated to or incurred by the San Luis Unit Contractors as of the date of the Westlands Agreement or Northerly Districts Agreement, respectively, including, but not limited to, costs attributable to the Folsom Safety of Dams modifications or the B.F. Sisk corrective action study or any Safety of Dams, or to the repayment of future capital costs incurred after the date of execution of the Westlands or Northerly Districts Agreements;

(4) Central Valley Project construction costs or other capitalized costs allocated to Westlands Water District after the date of the Westlands Agreement, and properly assignable to Westlands Water District, shall be repaid in not more than 5 years after notification of the allocation of such amount of less than \$5,000,000. If such amount is \$5,000,000 or greater, such cost shall be repaid as provided by applicable Reclamation law. Central Valley Project construction costs or other capitalized costs allocated to any of the Northerly San Luis Unit Districts after the date of the Northerly District Agreement shall be repaid as provided by applicable Reclamation law. Any additional costs that may have been assigned to the San Luis

Unit Contractors pursuant to paragraph 9(c)(iv) of the Westlands Agreement and paragraph XXXX of the Northerly Districts Agreement respectively, related to the Central Valley Project final cost allocation shall be non-reimbursable.

(e) APPLICABILITY OF CERTAIN PROVISIONS—

(1) RECLAMATION REFORM ACT— Upon discharge of the capital repayment obligation as provided in subsection (b), the provisions of section 213(a) and (b) of the Reclamation Reform Act of 1982 (96 Stat. 1269) shall be deemed to apply to lands in Westlands Water District and the Northerly San Luis Unit Districts, and the ownership and full cost pricing limitations in any provision of Federal reclamation law shall not apply to lands in these Districts notwithstanding the subsequent allocation of construction costs or other capitalized costs to the Districts. These exemptions shall be carried out in accordance with the process set forth in the Westlands Agreement and Northerly Districts Agreement.

(2) OTHER PROVISIONS—Nothing in this Act is intended to relieve the San Luis Unit Contractors of any other obligations under Reclamation Law including Restoration Fund charges pursuant to section 3407(d) of Public Law 102-575.

(3) The Secretary is authorized to provide financial assistance as specified in paragraph [XX] of the Northerly District Agreement. \$70 million in funds expended by the Secretary pursuant to the Northerly Districts Agreement shall be non-reimbursable.

SEC. 8. TRANSFER OF TITLE TO CERTAIN FACILITIES.

(a) IN GENERAL.—Upon the execution of the section 9(d) repayment contract, or as soon thereafter as practicable, the Secretary shall transfer to Westlands Water District title to:

(1) San Luis Canal System, excluding the main canal which is integrated with the California Aqueduct. These appurtenant features include:

- a. Internal water distribution system within Westlands, including:
 - i. Approximately 1,045 miles of buried pipeline.
- b. Pumping plants within Westlands, including:
 - i. San Luis Canal Left and Right Bank pumping plants. Includes but is not limited to Pumping Plants P1 through P38 located at the head end of the gravity laterals to supply the head required for the "P" laterals. Pumping Plants, tanks, reservoirs, re-lift pumping plants to serve lands west of the San Luis Canal. Pumping Plant 7.05 off Lateral 7.
- c. Related structures, appurtenances, pumping plants, pumps, motors, meters, valves, tanks, transformers and electrical

equipment as specifically identified through the title transfer process of federally owned facilities, equipment, and real property.

(2) Mendota Pool diversion facilities operated by Westlands Water District, including:

- a. Inlet Canal from the Fresno Slough.
- b. Pumping plants
 - i. 6-1, 6-2, 7-1, 7-2.
- c. Related structures, appurtenances, pumps, motors, meters, valves, tanks, transformers and electrical equipment as specifically identified through the title transfer process of federally owned facilities, equipment, and real property.

(3) Pleasant Valley System, including:

- a. Intake canal and pipeline.
- b. Pleasant Valley Pumping Plant.
- c. Coalinga Canal, including related check structures, turnouts, and headworks.
- d. Pleasant Valley distribution system and pumping plants along the Coalinga Canal.
- e. Related structures, appurtenances, pumps, motors, meters, valves, tanks, transformers and electrical equipment as specifically identified through the title transfer process of federally owned facilities, equipment, and real property.

(4) Drainage collection system, including:

- a. Carrier and collector pipelines, sumps, and sump pumps.
- b. San Luis Drain from Sta 6678+45 to Sta 8520+22.87.
(Crossing with DMC to Laguna Ave crossing)
- c. Related structures, appurtenances, pumps, motors, meters, valves, tanks, transformers and electrical equipment as specifically identified through the title transfer process of federally owned facilities, equipment, and real property.

(5) Tranquillity Field Office

- a. Buildings at 32650 West Adams Avenue, Tranquillity, CA 93668.
- b. All related fixtures and furnishings as specifically identified through the title transfer process of federally owned facilities, equipment, and real property.

(6) Huron Field Office

- a. Buildings at 32450 South Lassen Avenue, Huron, CA 93234.
- b. All related fixtures and furnishings as specifically identified through the title transfer process of federally owned facilities, equipment, and real property.

(7) All real property interests held by the United States in lands underlying or otherwise associated with the facilities and equipment listed in this subsection (a), including all fee title, easements, and rights of way.

(b) DEMONSTRATION TREATMENT PLANT--Upon execution of the section 9(d) repayment contract with the Panoche Water District, or as soon thereafter as practicable, the Secretary shall transfer to Panoche Drainage District title to the San Luis Demonstration Treatment Plant situated within the San Joaquin River Improvement Project. Upon transfer of title, the Secretary shall have no further responsibility for the operations and maintenance of the San Luis Demonstration Treatment Plant.

(c) SAN LUIS DRAIN.—Upon the execution of the section 9(d) repayment contracts with the Northerly San Luis Unit Districts, or as soon thereafter as practicable, and subject to the policies and procedures referenced in subsection (g), the Secretary shall transfer to a willing entity title to the portion of the San Luis Drain from Milepost 105.72, Check 19 (near Russell Avenue) to Milepost 78.5 (Mud Slough) upon such terms as the Secretary determines are appropriate. If no willing entity is found to accept title, then the Secretary is authorized to maintain title to the facility and is authorized to transfer at a later date.

(d) TRANSFER TO THE NORTHERLY SAN LUIS UNIT DISTRICTS. — Upon the execution of the respective section 9(d) repayment contract with each Northerly San Luis Unit District, or as soon thereafter as practicable, and subject to the policies and procedures referenced in subsection (g), the Secretary shall transfer to such Northerly San Luis Unit District the United States' interest, if any, to their respective facilities as follows:

(1) To the Pacheco Water District, all facilities owned by the United States that are within and operated by the Pacheco Water District, including but not limited to:

- a. San Luis Canal Left Bank turnouts and any pumping plants operated by Pacheco Water District, including but not limited to facilities at San Luis Canal Milepost 89.66LA and 89.66LB.
- b. Related structures, appurtenances, pumping plants, pumps, pipelines, motors, meters, valves, tanks, transformers and electrical equipment as specifically identified through the title transfer process of federally owned facilities, equipment, and real property covered by this subsection (1).

(2) To the Panoche Water District, all facilities owned by the United States that are within and operated by the Panoche Water District, including but not limited to:

- a. San Luis Canal Left and Right Bank turnouts and any pumping plants operated by Panoche Water District, including but not limited to facilities at San Luis Canal Milepost 96.15L; 96.85L; 100.48L and 102.64L.
- b. Delta-Mendota Canal turnouts and any pumping plants operated by Panoche Water District including but not limited to facilities at Delta-Mendota Canal Milepost 93.25R and MP 96.70R.
- c. Related structures, appurtenances, pumping plants, pumps, pipelines, motors, meters, valves, tanks, transformers and electrical equipment as specifically identified through the title transfer process of federally owned facilities, equipment, and real property covered by this subsection (2).

(3) To the San Luis Water District, all facilities owned by the United States that are within and operated by the San Luis Water District, including but not limited to:

- a. All water conveyance and lateral systems, and other related works for the furnishing of water and all lands and interest in lands, any buildings, equipment and machinery necessary for the operation and maintenance of the water delivery facilities, pumping plants, turnouts, including but not limited to San Luis Water District pumping plants appurtenant to the Delta-Mendota Canal and the San Luis Canal, solely utilized by the San Luis Water District, located at miles posts:

D87.48R – Kaljian PP

S075.49R – PP6, PP7

S079.39R – PP8, PP9

S082.10R – PP10, PP11

S092.16R (A-D) - PP3, Fittje, PP4, PP5

S101.70R – PP16, PP17

- b. Related structures, appurtenances, pumping plants, pumps, pipelines, motors, meters, valves, tanks, transformers and electrical equipment as specifically identified through the title transfer process of federally owned facilities, equipment, and real property associated with this subsection (3).

(4) To the district receiving title to the associated facilities and equipment, all real property interests held by the United States in lands underlying or

otherwise associated with the facilities and equipment listed in this subsection (d), including all fee title, easements, and rights of way.

(e) Except as specifically provided in this Act, any transfer of title to the Pleasant Valley Pumping Plant, the Coalinga Canal, and any associated facilities shall not relieve any other Project Water service or repayment contractor of the requirement to pay any allocated costs associated with those conveyance or pumping facilities that are properly allocated to those contractors under existing law and Project ratesetting policies.

(f) Upon transfer of title to any facilities pursuant to section, the San Luis Unit Contractor(s) or other entity receiving title shall, as a condition to such transfer, formally agree that as of the date of transfer to:

(1) hold the United States harmless and indemnify the United States for any and all claims, cost, damages, and judgments of any kind arising out of any act, omission, or occurrence relating to the transferred facilities, except for such claims, costs, damages arising from acts of negligence committed by the United States or by its employees, agents, or contractors prior to the date of title transfer for which the United States is found liable under the Federal Tort Claims Act; and

(2) the United States shall have no responsibility for correcting and financing any repairs or deficiencies that may exist at the time of or following title transfer.

(g) The Secretary shall transfer title pursuant to this section consistent with all applicable Reclamation policies and procedures. The Secretary and the San Luis Unit Contractor(s) or other entity acquiring title shall comply with all applicable requirements under Federal and California law before title to a facility is transferred pursuant to this section.

SEC. 9. COMPLIANCE WITH APPLICABLE LAW.

In implementing the measures authorized by this Act, the Secretary shall comply with all applicable Federal laws, rules, and regulations, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), as necessary.

SEC. 10. NO WATER SUPPLY OR FINANCIAL IMPACTS ON OTHER CENTRAL VALLEY PROJECT CONTRACTORS

Implementation of this Act and the Agreements authorized thereunder shall not:

(a) Result in the involuntary reduction in the contract water allocation to any Central Valley Project water service or repayment contractor, water rights settlement contractor, exchange contractor, or refuge contractor, including contractors in the Friant Division of the Central Valley Project;

- (b) Modify, amend or affect any of the rights and obligations of the parties to any Central Valley Project water service or repayment contract, water rights settlement contract, exchange contract, or refuge contract, including contracts in the Friant Division of the Central Valley Project; or
- (c) Alter the repayment obligation, if any, of (1) any Central Valley Project water service or repayment contractor; (2) any Central Valley Project settlement, refuge or exchange contractor; or (3) any Central Valley Project preference power contractor receiving water or power from the Central Valley Project, or shift any costs to such contractors that would otherwise have been properly assignable to San Luis Unit Contractors, including operations and maintenance costs, construction costs, or other capitalized costs allocated to San Luis Unit Contractors after the date of this Act.
- (d) Impair the ability of the United States to implement f the Stipulation of Settlement approved by the district court in Natural Resources Defense Council, et al. v. Rogers, et al, (Case No. CIV S-88-1658 (LKK/GGH) E.D.Cal.) on October 23, 2006, as authorized to be implemented by Title X of Public Law 111-11, including the Restoration Goal and Water Management Goal.
- (e) Diminish, impair, or otherwise affect in any manner any priorities for the allocation, delivery or use of water under applicable law, including any purposes of use and priorities established by Sections 3402 and 3406 of the Central Valley Project Improvement Act (Public Law 102-575; 106 Stat. 4706).

SEC. 11. RESTORATION FUND PAYMENTS BY WESTLANDS WATER DISTRICT

For any year in which the allocation of water for south-of-Delta Central Valley Project long-term water irrigation service contractors or irrigation repayment contractors is greater than 75%, the Secretary shall calculate for Westlands Water District a per acre foot Restoration Fund payment based on a projection that Westlands Water District would take delivery of the full allocation made to south-of-Delta Central Valley Project long-term water service contractors or repayment contractors.

From: Noles, Holly A.
Sent: Monday, May 2, 2016 8:10 AM
To: Johnny Amaral
Subject: Today's Westlands Call

Good Morning Johnny-

I wanted to give you a heads up that David Bernhardt will not be on today's call but Ryan Smith will be. Thanks!

-Holly

Holly A. Noles

Executive Assistant

Brownstein Hyatt Farber Schreck, LLP

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From: Johnny Amaral
Sent: Monday, May 2, 2016 8:22 AM
To: Noles, Holly A.
Subject: Re: Today's Westlands Call

Thanks

Best,

Johnny Amaral

On May 2, 2016, at 8:09 AM, Noles, Holly A. <HNOLES@bhfs.com> wrote:

Good Morning Johnny-

I wanted to give you a heads up that David Bernhardt will not be on today's call but Ryan Smith will be.
Thanks!

-Holly

Holly A. Noles

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From: Jason Peltier
Sent: Friday, May 6, 2016 7:39 AM
To: Dennis Cardoza; David Bernhardt; Ara Azhderian; Johnny Amaral
Subject: Fwd: Senate WRDA Bill
Attachments: Water Resources Development Act of 2016 (S. 2848).pdf; ATT00001.htm

Begin forwarded message:

From: "Dan Keppen" <dankeppen@charter.net>
To: "Bill Kennedy" <[REDACTED]@[REDACTED]> "Chris Hurd" <[REDACTED]@[REDACTED]>
" [REDACTED]@ [REDACTED] " <[REDACTED]@ [REDACTED] "Don Schwandt"
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<[REDACTED]@ [REDACTED] "Ron Rayner" <[REDACTED]@ [REDACTED] "Sandy Denn"
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Montgomery" <nmontgomery@sidwater.org>, "Norm Haak" <[REDACTED]@ [REDACTED] "Norm
Semanko" <norm@iwua.org>, "North Platte Irrigators" <[REDACTED]@ [REDACTED]
"Ortega, Antonio" <AOrtega@IID.com>, "Pat Riley" <[REDACTED]@ [REDACTED] "Paul Orme"
<[REDACTED]@ [REDACTED] "Rebecca Davidson" <[REDACTED]@ [REDACTED] "Richard
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<[REDACTED]@ [REDACTED] "Tom Myrum" <tmyrum@wswra.org>, "Wade Noble"
<wade@noblelaw.com>
Cc: "Gary Sawyers" <gws@bolenfransen.com>, "Mark Limbaugh"
<mlimbaugh@tfgnet.com>, "Ara Azhderian" <ara.azhderian@sldmwa.org>, "Shelley
Ostrowski" <sostrowski@westlandswater.org>
Subject: Senate WRDA Bill

Dear Alliance Directors and Advisory Committee Members:

Last week, the Senate Environment and Public Works (EPW) Committee released its version of the Water Resources Development Act (WRDA) of 2016 (S. 2848) and held a markup hearing on the legislation. Attached is the text of the 2016 WRDA (S. 2848), in addition to a 20-page section-by-section summary of the bill, a one-page table of new project authorizations in the 2016 WRDA bill, and a shorter, 3-page summary of the 2016 WRDA bill, all provided by the Senate EPW Committee. The bill includes provisions affecting both the U.S. Army Corps of Engineers (Corps) as well as the Environmental Protection Agency (EPA), and we are still analyzing the many provisions included in the 271-page bill.

The House Transportation and Infrastructure (T&I) Committee is preparing their own version of a WRDA for a Committee markup sometime this month.

Many thanks to Mark Limbaugh for putting this information together.

Best regards –

Dan Keppen
Executive Director

From: Johnny Amaral
Sent: Monday, May 9, 2016 10:41 AM
To: David Bernhardt
Subject: DC member and staff contact list

Several weeks ago, if not several months ago, I asked you to send me a list of all the contact information, including email addresses, for all the California members. Both parties. You sent it to me, but now I cannot find it. Can you send it to me again?

Best,

Johnny Amaral

From: Bernhardt, David L.

Sent: Monday, May 9, 2016 1:52 PM

To: Johnny Amaral (jamaral@westlandswater.org)

Subject: FW: DC member and staff contact list

Attachments: CA Dem Delegation_(14510607_1).xlsx

[Per your request.](#)

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Last Name	First Name	District Number	Chief	District Director	Water/natural resources staffer	phone
Aguilar	Pete	31	boris.medzhibovsky@mail.house.gov	teresa.valdes@mail.house.gov	stephanie.cuevas@mail.house.gov	202-225-3201
Bass	Karen	37	carrie.kohns@mail.house.gov	maral.karaccusian@mail.house.gov	samaura.stone@mail.house.gov	202-225-7084
Becerra	Xavier	34	sean.mccluskie@mail.house.gov	liz.saldivar@mail.house.gov	johanna.montiel@mail.house.gov	202-225-6235
Bera	Ami	7	chad.overmiller@mail.house.gov	faith.whitmore@mail.house.gov	erin.oquinn@mail.house.gov	202-225-5716
Brownley	Julia	26	lenny.young@mail.house.gov	carina.armenta@mail.house.gov	jean.fundakowski@mail.house.gov	202-225-5811
Capps	Lois	24	sarah.rubinfield@mail.house.gov	vianey.lopez@mail.house.gov	eliot.crafton@mail.house.gov	202-225-3601
Cardenas	Tony	29	virginia.zigras@mail.house.gov	gabriela.marquez@mail.house.gov	miguel.franco@mail.house.gov	202-225-6131
Chu	Judy	27	linda.shim@mail.house.gov	becky.cheng@mail.house.gov	sonali.desai@mail.house.gov	202-225-5464
Costa	Jim	16	juan.lopez@mail.house.gov	gary.chahil@mail.house.gov	scott.petersen@mail.house.gov	202-225-3341
Davis	Susan	53	lisa.sherman@mail.house.gov	jessica.poole@mail.house.gov	matt.weiner@mail.house.gov	202-225-2040
DeSaulnier	Mark	11	betsyarnoldmarr@mail.house.gov	shanelle.scales@mail.house.gov	emlyn.struthers@mail.house.gov	202-225-2095
Eshoo	Anna	18	No Chief- LD is David.Grossman@mail.house.gov	karen.chapman@mail.house.gov	paul.beck@mail.house.gov	202-225-8104
Farr	Sam	20	rochelle.dornatt@mail.house.gov	alec.arago@mail.house.gov	troy.phillips@mail.house.gov	202-225-2861
Garamendi	John	3	emily.burns@mail.house.gov	john.evalle@mail.house.gov	garrett.durst@mail.house.gov	202-225-1880
Hahn	Janice	44	laurie.saroff@mail.house.gov	lara.larramendi@mail.house.gov	jocelyn.rivera-olivas@mail.house.gov	202-225-8220
Honda	Mike	17	jennifer.vanderheide@mail.house.gov	lenine.umali@mail.house.gov	laurie.chong@mail.house.gov	202-225-2631
Huffman	Jared	2	logan.ferree@mail.house.gov	jenny.callaway@mail.house.gov	noah.oppenheim@mail.house.gov	202-225-5161
Lee	Barbara	13	julie.nickson@mail.house.gov	adrienne.ursino@mail.house.gov	emma.mehrabi@mail.house.gov	202-225-2661
Lieu	Ted	33	marc.cevasco@mail.house.gov	lisa.pinto@mail.house.gov	megan.price@mail.house.gov	202-225-3976
Lofgren	Zoe	19	stacy.leavandosky@mail.house.gov	sandra.soto@mail.house.gov	angela.ebner@mail.house.gov	202-225-3072
Lowenthal	Alan	47	tim.hysom@mail.house.gov	mark.pulido@mail.house.gov	devin.helfrich@mail.house.gov	202-225-7924
Matsui	Doris	6	julie.eddy@mail.house.gov	sam.stefanki@mail.house.gov	jonathan.gilbert@mail.house.gov	202-225-7163
McNery	Jerry	9	nicole.alioto@mail.house.gov	alisa.alva@mail.house.gov	teresa.frison@mail.house.gov	202-225-1947
Napolitano	Grace	32	daniel.chao@mail.house.gov	perla.hernandez@mail.house.gov	joseph.ciccone@mail.house.gov	202-225-5256
Pelosi	Nancy	12	robert.edmonson@mail.house.gov	dan.bernal@mail.house.gov	adela.amador@mail.house.gov	202-225-4965
Peters	Scott	52	michelle.dorothy@mail.house.gov	hugo.carmona@mail.house.gov	kc.jaski@mail.house.gov	202-225-0508
Roybal	Lucille	40	victor.castillo@mail.house.gov	ana.figueroa@mail.house.gov	adam.sachs@mail.house.gov	202-225-1766
Ruiz	Raul	36	cookab.hashemi@mail.house.gov	octavio.gonzalez@mail.house.gov	ross.arnett@mail.house.gov	202-225-5330
Sanchez	Linda	38	lea.sulkala@mail.house.gov	yvette.shahinian@mail.house.gov	andrew.noh@mail.house.gov	202-225-6676
Sanchez	Loretta	46	jennifer.warburton@mail.house.gov	carlos.urquiza@mail.house.gov	lorenzo.rubalcava@mail.house.gov	202-225-2965
Schiff	Adam	28	jeff.lowenstein@mail.house.gov	ann.peifer@mail.house.gov	courtney.fogwell@mail.house.gov	202-225-4176
Sherman	Brad	30	don.macdonald@mail.house.gov	scott.abrams@mail.house.gov	lauren.wolman@mail.house.gov	202-225-5911
Speier	Jackie	14	josh.connolly@mail.house.gov	brian.perkins@mail.house.gov	miriam.goldstein@mail.house.gov	202-225-3531
Swalwell	Eric	15	ricky.le@mail.house.gov	cheri.greven@mail.house.gov	andrew.ginsburg@mail.house.gov	202-225-5065
Takano	Mark	41	richard.mcpike@mail.house.gov	rafael.elizalde@mail.house.gov	claire.viall@mail.house.gov	202-225-2305
Thompson	Mike	5	melanie.rhinehart@mail.house.gov	brad.onorato@mail.house.gov	meridith.sebring@mail.house.gov	202-225-3311
Torres	Norma	35	dara.postar@mail.house.gov	veronica.zendejas@mail.house.gov	grant.kerr@mail.house.gov	202-225-6161
Vargas	Juan	51	tim.walsh@mail.house.gov	janine.pairis@mail.house.gov	aaron.allen@mail.house.gov	202-225-8045
Waters	Maxine	43	twaun.samuel@mail.house.gov	blanca.jimenez@mail.house.gov	kathleen.sengstock@mail.house.gov	202-225-2201

From: Johnny Amaral
Sent: Monday, May 9, 2016 4:27 PM
To: 'Bernhardt, David L.'
Subject: RE: DC member and staff contact list

Perfect. Do you have this for the GOP offices too?

From: Bernhardt, David L. [mailto:DBernhardt@BHFS.com]
Sent: Monday, May 9, 2016 1:53 PM
To: Johnny Amaral (jamaral@westlandswater.org) <jamaral@westlandswater.org>
Subject: FW: DC member and staff contact list

Per your request.

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Subject: FW: DC member and staff contact list
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Subject: FW: DC member and staff contact list

[Per your request.](#)

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Last Name	First Name	District Number	Chief	District Director	Water/natural resources staffer	phone
Aguilar	Pete	31	boris.medzhibovsky@mail.house.gov	teresa.valdes@mail.house.gov	stephanie.cuevas@mail.house.gov	202-225-3201
Bass	Karen	37	carrie.kohns@mail.house.gov	maral.karaccusian@mail.house.gov	samaura.stone@mail.house.gov	202-225-7084
Becerra	Xavier	34	sean.mccluskie@mail.house.gov	liz.saldivar@mail.house.gov	johanna.montiel@mail.house.gov	202-225-6235
Bera	Ami	7	chad.overmiller@mail.house.gov	faith.whitmore@mail.house.gov	erin.oquinn@mail.house.gov	202-225-5716
Brownley	Julia	26	lenny.young@mail.house.gov	carina.armenta@mail.house.gov	jean.fundakowski@mail.house.gov	202-225-5811
Capps	Lois	24	sarah.rubinfield@mail.house.gov	vianey.lopez@mail.house.gov	eliot.crafton@mail.house.gov	202-225-3601
Cardenas	Tony	29	virginia.zigras@mail.house.gov	gabriela.marquez@mail.house.gov	miguel.franco@mail.house.gov	202-225-6131
Chu	Judy	27	linda.shim@mail.house.gov	becky.cheng@mail.house.gov	sonali.desai@mail.house.gov	202-225-5464
Costa	Jim	16	juan.lopez@mail.house.gov	gary.chahil@mail.house.gov	scott.petersen@mail.house.gov	202-225-3341
Davis	Susan	53	lisa.sherman@mail.house.gov	jessica.poole@mail.house.gov	matt.weiner@mail.house.gov	202-225-2040
DeSaulnier	Mark	11	betsyarnoldmarr@mail.house.gov	shanelle.scales@mail.house.gov	emlyn.struthers@mail.house.gov	202-225-2095
Eshoo	Anna	18	No Chief- LD is David.Grossman@mail.house.gov	karen.chapman@mail.house.gov	paul.beck@mail.house.gov	202-225-8104
Farr	Sam	20	rochelle.dornatt@mail.house.gov	alec.arago@mail.house.gov	troy.phillips@mail.house.gov	202-225-2861
Garamendi	John	3	emily.burns@mail.house.gov	john.evalle@mail.house.gov	garrett.durst@mail.house.gov	202-225-1880
Hahn	Janice	44	laurie.saroff@mail.house.gov	lara.larramendi@mail.house.gov	jocelyn.rivera-olivas@mail.house.gov	202-225-8220
Honda	Mike	17	jennifer.vanderheide@mail.house.gov	lenine.umali@mail.house.gov	laurie.chong@mail.house.gov	202-225-2631
Huffman	Jared	2	logan.ferree@mail.house.gov	jenny.callaway@mail.house.gov	noah.oppenheim@mail.house.gov	202-225-5161
Lee	Barbara	13	julie.nickson@mail.house.gov	adrienne.ursino@mail.house.gov	emma.mehrabi@mail.house.gov	202-225-2661
Lieu	Ted	33	marc.cevasco@mail.house.gov	lisa.pinto@mail.house.gov	megan.price@mail.house.gov	202-225-3976
Lofgren	Zoe	19	stacy.leavandosky@mail.house.gov	sandra.soto@mail.house.gov	angela.ebner@mail.house.gov	202-225-3072
Lowenthal	Alan	47	tim.hysom@mail.house.gov	mark.pulido@mail.house.gov	devin.helfrich@mail.house.gov	202-225-7924
Matsui	Doris	6	julie.eddy@mail.house.gov	sam.stefanki@mail.house.gov	jonathan.gilbert@mail.house.gov	202-225-7163
McNery	Jerry	9	nicole.alioto@mail.house.gov	alisa.alva@mail.house.gov	teresa.frison@mail.house.gov	202-225-1947
Napolitano	Grace	32	daniel.chao@mail.house.gov	perla.hernandez@mail.house.gov	joseph.ciccone@mail.house.gov	202-225-5256
Pelosi	Nancy	12	robert.edmonson@mail.house.gov	dan.bernal@mail.house.gov	adela.amador@mail.house.gov	202-225-4965
Peters	Scott	52	michelle.dorothy@mail.house.gov	hugo.carmona@mail.house.gov	kc.jaski@mail.house.gov	202-225-0508
Roybal	Lucille	40	victor.castillo@mail.house.gov	ana.figueroa@mail.house.gov	adam.sachs@mail.house.gov	202-225-1766
Ruiz	Raul	36	cookab.hashemi@mail.house.gov	octavio.gonzalez@mail.house.gov	ross.arnett@mail.house.gov	202-225-5330
Sanchez	Linda	38	lea.sulkala@mail.house.gov	yvette.shahinian@mail.house.gov	andrew.noh@mail.house.gov	202-225-6676
Sanchez	Loretta	46	jennifer.warburton@mail.house.gov	carlos.urquiza@mail.house.gov	lorenzo.rubalcava@mail.house.gov	202-225-2965
Schiff	Adam	28	jeff.lowenstein@mail.house.gov	ann.peifer@mail.house.gov	courtney.fogwell@mail.house.gov	202-225-4176
Sherman	Brad	30	don.macdonald@mail.house.gov	scott.abrams@mail.house.gov	lauren.wolman@mail.house.gov	202-225-5911
Speier	Jackie	14	josh.connolly@mail.house.gov	brian.perkins@mail.house.gov	miriam.goldstein@mail.house.gov	202-225-3531
Swalwell	Eric	15	ricky.le@mail.house.gov	cheri.greven@mail.house.gov	andrew.ginsburg@mail.house.gov	202-225-5065
Takano	Mark	41	richard.mcpike@mail.house.gov	rafael.elizalde@mail.house.gov	claire.viall@mail.house.gov	202-225-2305
Thompson	Mike	5	melanie.rhinehart@mail.house.gov	brad.onorato@mail.house.gov	meridith.sebring@mail.house.gov	202-225-3311
Torres	Norma	35	dara.postar@mail.house.gov	veronica.zendejas@mail.house.gov	grant.kerr@mail.house.gov	202-225-6161
Vargas	Juan	51	tim.walsh@mail.house.gov	janine.pairis@mail.house.gov	aaron.allen@mail.house.gov	202-225-8045
Waters	Maxine	43	twaun.samuel@mail.house.gov	blanca.jimenez@mail.house.gov	kathleen.sengstock@mail.house.gov	202-225-2201

From: Bernhardt, David L.
Sent: Tuesday, May 10, 2016 1:14 PM
To: Johnny Amaral
Subject: Fwd: Senate ENR hearing

FYI

[Water and Power Subcommittee Hearing on Pending Legislation](#)

02:00 PM

The Senate Energy and Natural Resources Subcommittee on Water and Power will hold a legislative hearing on Tuesday, May 17 at 2 p.m. to receive testimony on the following bills.

- [S. 2524](#) (Gardner) – Bolts Ditch Access and Use Act
- [S. 2533](#) (Feinstein) – California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act
- [S. 2616](#) (Gardner) – A bill to modify certain cost-sharing and revenue provisions relating to Arkansas Valley Conduit, Colorado
- [S. 2902](#) – The Western Water Supply and Planning Enhancement Act
- [S. 2907](#) (Reid) – To amend the Energy and Water Development and Related Agencies Appropriations Act, 2015, to strike the termination date for funding for pilot projects to increase Colorado River System water in Lake Mead, and for other purposes

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From: Petersen, Scott

Sent: Wednesday, May 11, 2016 8:45 AM

To: 'Gayle Holman'

CC: Johnny Amaral; 'Smith, Ryan A.'; David Bernhardt; Solberg, Kristina; tbirmingham@westlandswater.org

Subject: Drainage Legislation introduction

Importance: High

Good morning Gayle,

My boss anticipates introducing the legislation for the drainage settlement for the entire San Luis Unit by close of business today or at the latest tomorrow. Would Westlands like to include a quote in the press release that my boss plans to put out?

We'll send you a draft later today. Also, is there anything in particular that Westlands would like to ensure is noted in the release?

Best, Scott

J. Scott Petersen, P.E.

Deputy Chief of Staff

Rep. Jim Costa (CA-16)

1314 Longworth House Office Building

Washington, DC 20515

(202) 225-3341

From: Johnny Amaral
Sent: Wednesday, May 11, 2016 8:50 AM
To: 'Petersen, Scott'; 'Gayle Holman'
CC: 'Smith, Ryan A.'; 'David Bernhardt'; 'Solberg, Kristina'; tbirmingham@westlandswater.org
Subject: RE: Drainage Legislation introduction

Are you including quotes or comments from the northerly districts also?

From: Petersen, Scott [mailto:Scott.Petersen@mail.house.gov]
Sent: Wednesday, May 11, 2016 8:45 AM
To: 'Gayle Holman'
Cc: Johnny Amaral; 'Smith, Ryan A.'; David Bernhardt; Solberg, Kristina; tbirmingham@westlandswater.org
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J. Scott Petersen, P.E.

Deputy Chief of Staff
Rep. Jim Costa (CA-16)
1314 Longworth House Office Building
Washington, DC 20515
(202) 225-3341

From: Petersen, Scott
Sent: Wednesday, May 11, 2016 8:55 AM
To: 'Johnny Amaral'; 'Gayle Holman'
CC: 'Smith, Ryan A.'; 'David Bernhardt'; Solberg, Kristina; tbirmingham@westlandswater.org
Subject: RE: Drainage Legislation introduction

I have reached out to them, but they haven't responded. You all got the outreach e-mail at the same time.

I can loop back around with you all when/if they respond, or alternatively, if you want to provide a quote and set terms for its inclusion, ie, other districts comments as well, that works for us. Just let me know what makes the most sense for Westlands.

J. Scott Petersen, P.E.

Deputy Chief of Staff
Rep. Jim Costa (CA-16)

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Wednesday, May 11, 2016 11:50 AM
To: Petersen, Scott; 'Gayle Holman'
Cc: 'Smith, Ryan A.'; 'David Bernhardt'; Solberg, Kristina; tbirmingham@westlandswater.org
Subject: RE: Drainage Legislation introduction

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J. Scott Petersen, P.E.

Deputy Chief of Staff
Rep. Jim Costa (CA-16)
1314 Longworth House Office Building
Washington, DC 20515
(202) 225-3341

From: Johnny Amaral
Sent: Wednesday, May 11, 2016 9:09 AM
To: 'Petersen, Scott'; 'Gayle Holman'
CC: 'Smith, Ryan A.'; 'David Bernhardt'; 'Solberg, Kristina'; tbirmingham@westlandswater.org
Subject: RE: Drainage Legislation introduction

My philosophy on making public comments is...first, do no harm. I don't think it's good for you or us if WE are the target of criticism upon bill introductio. There will be plenty of that to deal with as this progresses. So let's wait and see what the other districts do.

From: Petersen, Scott [mailto:Scott.Petersen@mail.house.gov]
Sent: Wednesday, May 11, 2016 8:55 AM
To: 'Johnny Amaral'; 'Gayle Holman'
Cc: 'Smith, Ryan A.'; 'David Bernhardt'; Solberg, Kristina; tbirmingham@westlandswater.org
Subject: RE: Drainage Legislation introduction

I have reached out to them, but they haven't responded. You all got the outreach e-mail at the same time.

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To: 'Johnny Amaral'; 'Gayle Holman'
CC: 'Smith, Ryan A.'; 'David Bernhardt'; Solberg, Kristina; tbirmingham@westlandswater.org
Subject: RE: Drainage Legislation introduction

Sounds like a plan. I'll loop back around when we have a response from the others.

J. Scott Petersen, P.E.

Deputy Chief of Staff
Rep. Jim Costa (CA-16)

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Wednesday, May 11, 2016 12:09 PM
To: Petersen, Scott; 'Gayle Holman'
Cc: 'Smith, Ryan A.'; 'David Bernhardt'; Solberg, Kristina; tbirmingham@westlandswater.org
Subject: RE: Drainage Legislation introduction

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Subject: RE: Drainage Legislation introduction

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I can loop back around with you all when/if they respond, or alternatively, if you want to provide a quote and set terms for its inclusion, ie, other districts comments as well, that works for us. Just let me know what makes the most sense for Westlands.

J. Scott Petersen, P.E.

Deputy Chief of Staff
Rep. Jim Costa (CA-16)

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Wednesday, May 11, 2016 11:50 AM
To: Petersen, Scott; 'Gayle Holman'
Cc: 'Smith, Ryan A.'; 'David Bernhardt'; Solberg, Kristina; tbirmingham@westlandswater.org
Subject: RE: Drainage Legislation introduction

Are you including quotes or comments from the northerly districts also?

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Sent: Wednesday, May 11, 2016 8:45 AM
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Cc: Johnny Amaral; 'Smith, Ryan A.'; David Bernhardt; Solberg, Kristina; tbirmingham@westlandswater.org
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Best, Scott

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Deputy Chief of Staff

Rep. Jim Costa (CA-16)

1314 Longworth House Office Building

Washington, DC 20515

(202) 225-3341

From: Johnny Amaral
Sent: Thursday, May 12, 2016 3:19 PM
To: 'Petersen, Scott'
Subject: RE: Drainage Legislation introduction

How are we doing?

From: Petersen, Scott [<mailto:Scott.Petersen@mail.house.gov>]
Sent: Wednesday, May 11, 2016 9:14 AM
To: 'Johnny Amaral'; 'Gayle Holman'
Cc: 'Smith, Ryan A.'; 'David Bernhardt'; Solberg, Kristina; tbirmingham@westlandswater.org
Subject: RE: Drainage Legislation introduction

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From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Wednesday, May 11, 2016 12:09 PM
To: Petersen, Scott; 'Gayle Holman'
Cc: 'Smith, Ryan A.'; 'David Bernhardt'; Solberg, Kristina; tbirmingham@westlandswater.org
Subject: RE: Drainage Legislation introduction

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Rep. Jim Costa (CA-16)
1314 Longworth House Office Building
Washington, DC 20515
(202) 225-3341

From: Petersen, Scott
Sent: Thursday, May 12, 2016 4:03 PM
To: Johnny Amaral
Subject: Re: Drainage Legislation introduction

Done and done, my friend. We're in and submitted.

Sent from my iPhone, with brevity...

On May 12, 2016, at 6:18 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

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Deputy Chief of Staff
Rep. Jim Costa (CA-16)
1314 Longworth House Office Building
Washington, DC 20515
(202) 225-3341

From: Jason Peltier
Sent: Friday, May 13, 2016 9:39 AM
To: Johnny Amaral; Dennis Cardoza; David Bernhardt; Ara Azhderian
CC: T Birmingham; Shelley Ostrowski
Subject: FW: Feinstein drought bill S 2533 - GWD, DU, CWA support letter
Attachments: S 2533 Support Letter.pdf; ATT00001.htm

From: Ric Ortega [mailto:rortega@gwdwater.org]
Sent: Friday, May 13, 2016 9:20 AM
To: David Guy <dguy@norcalwater.org>; Steve Chedester <stevechedester@sjrecwa.net>; Jason Peltier <jason.peltier@sldmwa.org>
Subject: Feinstein drought bill S 2533 - GWD, DU, CWA support letter



May 12, 2016

The Honorable Dianne Feinstein
331 Hart Senate Office Building
Washington, DC 20510

**Re: S. 2533, California Long-Term Provisions for Water Supply and
Short-Term Provisions for Emergency Drought Relief Act —
Support**

Dear Senator Feinstein:

Our organizations, and the thousands of California landowners and sportsmen we represent, support S. 2533. Thank you for your efforts to work with refuge water contractors and stakeholders who are invested in a healthy future for the migratory birds of the Pacific Flyway and other wildlife.

Water supply development takes a great toll on wetlands, and any new water supply legislation must not further exacerbate this trend. The Central Valley Project Improvement Act was a critical step toward mitigating the environmental damage caused by decades of large-scale water development in California. A sustainable water future requires diligent preservation of that mitigation program, plus new innovations in water supply resilience.

The challenges and anxiety caused by drought should not lead to legislation that overturns established principles of law, policy, and contracts. Several sections of S. 2533 should be strengthened in order to make clear that actions authorized by your bill will not alter existing water contractor priorities in California. In addition, if the provisions of S. 2533 are changed to weaken refuge contractor protections, this will remove our support for the bill.

We continue to rely on your leadership and commitment to maintaining the backbone of wetland protections that keep California's water supplies flowing.

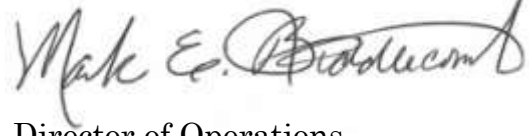
Sincerely,

Ricardo Ortega



General Manager
Director of Policy &
Governmental Affairs
Grassland Water & Resource
Conservation Districts

Mark Biddlecomb



Director of Operations
Western Region
Ducks Unlimited, Inc.

Jeff Volberg



Director of Water Law & Policy
California Waterfowl Association

cc: California Congressional Delegation

Subject: Fwd: May 25 hearing on legislative settlements has been moved to May 24 at 1030. Hope this isn't a problem

David Bernhardt

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Kiel Weaver
Staff Director
House Water, Power and Oceans Subcommittee
kiel.weaver@mail.house.gov
202- [REDACTED] - [REDACTED]

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From: Johnny Amaral

Sent: Monday, May 16, 2016 7:42 AM

To: Ryan A. ' 'Smith; Mike Burns; Ed Manning; Denny Rehberg; Dennis Cardoza; David Bernhardt; Catherine Karen; Carolyn Jensen

Subject: No calls today

I'm triple booked at the moment. I apologize for the short notice

Best,

Johnny Amaral

From: Bernhardt, David L.
Sent: Tuesday, May 17, 2016 9:05 AM
To: Johnny Amaral
Subject: Fwd: MEDIA ADVISORY: Legislative Hearing on Water Settlements
Attachments: image001.png; image002.png; image003.png; image004.png; image005.png

David Bernhardt

Begin forwarded message:

From: "Hrobsky, Jon A." <JHrobsky@BHFS.com>
Date: May 17, 2016 at 11:37:50 AM EDT
To: "Bernhardt, David L." <DBernhardt@BHFS.com>
Subject: Fwd: MEDIA ADVISORY: Legislative Hearing on Water Settlements

Begin forwarded message:

From: Natural Resources Press Office <naturalresourcesrepublicans@mail.house.gov>
Date: May 17, 2016 at 11:34:01 AM EDT
To: Natural Resources Press Office <naturalresourcesrepublicans@mail.house.gov>
Subject: MEDIA ADVISORY: Legislative Hearing on Water Settlements



MEDIA ADVISORY:

Legislative Hearing on Water Settlements

FOR IMMEDIATE RELEASE: May 17, 2016
CONTACT: [Elise Daniel](#) (202) 226-9019

Washington, D.C. – On Tuesday, May 24, 2016, at 10:30 AM, in 1334 Longworth House Office Building, the Subcommittee on Water, Power and Oceans will hold a legislative hearing on the following bills:

- [H.R. 4366](#) (Rep. David Valadao), To affirm an agreement between the United States and Westlands Water District dated September 15, 2015, and for other purposes. "San Luis Unit Drainage Resolution Act"

- [H.R. 5217](#) (Rep. Jim Costa), To affirm "The Agreement Between the United States and Westland Water District" dated September 15, 2015, "The Agreement Between the United States, San Luis Water District, Panoche Water District and Pacheco Water District", and for other purposes. *Luis Unit Drainage Resolution Act*"
- [Discussion draft of H.R. _____](#), To authorize and implement the water rights compact among the Blackfoot Tribe of the Blackfoot Indian Reservation, the State of Montana, and the United States and for other purposes. *"Blackfoot Water Rights Settlement Act of 2016"*

WHAT: Subcommittee on Water, Power and Oceans will hold a legislative hearing on H.R. 4311, H.R. 5217 and Discussion Draft of H.R. _____.

WHEN: Tuesday, May 24
10:30 AM

WHERE: 1334 Longworth House Office Building

Visit the [Committee Calendar](#) for additional information, once it is made available. The meeting is open to the public and a live video stream will be broadcast at [House Committee on Natural Resources](#).

Contact: Committee Press Office 202-226-9019

###

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From: Jason Peltier

Sent: Wednesday, May 18, 2016 8:34 AM

To: Dennis Cardoza; JWalsh@foley.com; David Bernhardt; Johnny Amaral; Ara Azhderian; Ed Manning; Carolyn Jensen

Subject: Doyle on drought legis.

California water bill: Here's why it's so hard for Congress to pass

Fish and farms are competing for precious California water

Feinstein's bill gets mixed reviews from House Democrats

Senate hearing could set stage for big Western water package

By Michael Doyle

mdoyle@mcclatchydc.com

WASHINGTON

Five years into California's latest drought, a major water bill compromise can seem as far away as ever.

The perennial conflict, often summed up as fish vs. farms, subtly surfaced again Tuesday at a key Senate hearing. A Western growers' advocate pleaded for relief, a Trout Unlimited leader urged caution and lawmakers insisted on optimism while conceding the tough road ahead.

"This bill is the product of two years of work (and) 28 drafts," said Sen. Dianne Feinstein, D-Calif., adding that her legislation "can produce real water in a manner consistent with the Endangered Species Act."

The 100-minute hearing before the Senate Water and Power Subcommittee, part of the Senate Energy and Natural Resources Committee, was the first this year on Feinstein's latest California water bill. Four other Western water bills were also reviewed, foreshadowing a Senate strategy of bundling together a West-wide measure attractive to multiple lawmakers

"The final details of this legislative package remain in flux," acknowledged Sen. Mike Lee, R-Utah.

An alternative Capitol Hill scenario envisions House of Representatives and Senate negotiators sliding California water provisions into must-pass spending legislation. Either option requires lawmakers to find a vehicle on which they can reconcile their differences.

Working out that conflict can get hard.

We are mindful that concerns voiced by other stakeholders regarding the operational provisions of (Feinstein's bill) have resulted in some controversy over the legislation. Bureau of Reclamation Commissioner Estevan Lopez

[The Senate bill introduced by Feinstein in February increases limits](#) on water transfers south of the Sacramento-San Joaquin Delta, but does not mandate specific pumping levels. It authorizes \$1.3 billion for desalination, water recycling, storage and grants. The money provided includes \$600 million for projects that could include constructing Temperance Flat or Sites Reservoir, in the Sacramento Valley, and raising Shasta Dam.

“On balance, we are confident and comfortable with this measured approach,” Bureau of Reclamation Commissioner Estevan Lopez said.

Timothy Quinn, executive director of the Association of California Water Agencies, which represents 440 water and irrigation districts in the state, likewise offered support, adding that Feinstein’s legislation “moves the federal government into closer alignment with key California water policies.”

At the same time, Lopez cautioned that “there is increased litigation risk” under some provisions of the Feinstein bill, and further acknowledged that “concerns voiced by other stakeholders . . . have resulted in some controversy.”

Laura Ziemer, senior counsel and water policy adviser for Trout Unlimited, similarly warned that part of the Feinstein proposal “seems likely to fuel more litigation and conflict.”

The Senate subcommittee hearing itself, while laying the procedural foundation for legislation to advance, did nothing to resolve any of the conflicts. No more than one or two senators on the 13-member committee were generally present during the hearing, and of some 18 questions asked of the witnesses, only two touched on California.

Shortly before the hearing, Walnut Grove, California, Rep. John Garamendi, a Democrat, introduced similar legislation in the House. Garamendi’s move mirroring Feinstein splits Northern California Democrats, who have often stuck together in sounding alarms about farmer-oriented water legislation.

While Garamendi said his companion bill would accomplish “vital tasks,” including providing “short-term” relief as well as “long-term” infrastructure, John McManus of the Golden Gate Salmon Association declared the legislation “would be deadly to salmon.” The seriousness of the concerns was hinted at by Sen. Ron Wyden, D-Ore., who said any bill “must avoid negative impacts on our fisheries.”

A competing Republican-authored bill [passed by the House last year would repeal](#) an ambitious San Joaquin River salmon-and-habitat restoration program and replace it with something smaller. It also directs the sale of the New Melones Dam on the Stanislaus River to local water districts.

The House bill introduced by Hanford Rep. David Valadao, a Republican, also pushes completion of studies of five potential water-storage projects, including construction of a new dam on the Upper San Joaquin River, and it mandates pumping levels to steer more water to farms south of the Delta.

“The House has passed a bill that I don’t believe, candidly, can pass the Senate,” Feinstein said..

Read more here: <http://www.sacbee.com/news/politics-government/article78165912.html#storylink=cpy>

From: Johnny Amaral
Sent: Wednesday, May 18, 2016 10:55 AM
To: 'Lowe, Molly'
Subject: RE: meeting request

2 pm on Wednesday works for us. Thanks!

My cell number is 559-████-████

Attendees will be:

Tom Birmingham
Johnny Amaral
David Bernhardt – Our DC lobbyist

From: Lowe, Molly [mailto:Molly.Lowe@mail.house.gov]
Sent: Tuesday, May 17, 2016 10:57 AM
To: 'Johnny Amaral'
Subject: RE: meeting request

Hi Johnny,

Would 2 p.m. on 5/25 work? If so, can you send me a list of attendees and the day of contact phone number?

Thanks!

Molly Lowe
Office of Congressman Ken Calvert (CA-42)
2205 Rayburn HOB
(202) 225 - 1986

From: Foley, Ian
Sent: Tuesday, May 17, 2016 1:56 PM
To: 'Johnny Amaral'
Cc: Lowe, Molly
Subject: RE: meeting request

Hey Johnny,

Molly will get the meeting scheduled. See you next week.

Best,
Ian

From: Johnny Amaral [<mailto:jamara1@westlandswater.org>]
Sent: Monday, May 16, 2016 4:08 PM
To: Foley, Ian
Subject: meeting request

lan,

Tom Birmingham and I will be in DC next week on business and wanted to get together with you and Ken. Does he have any time Tuesday (24th) afternoon, Wednesday (25th), or Thursday (26th) morning?

Johnny Amaral
Deputy General Manager – External Affairs
Westlands Water District

From: Lowe, Molly
Sent: Wednesday, May 18, 2016 10:57 AM
To: Johnny Amaral
Subject: RE: meeting request

Awesome, thanks, Johnny!

Molly Lowe

Office of Congressman Ken Calvert (CA-42)
2205 Rayburn HOB
(202) 225 - 1986

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Johnny Amaral
Deputy General Manager – External Affairs
Westlands Water District

From: Bernhardt, David L.

Sent: Friday, May 20, 2016 7:06 AM

To: Ckaren@sidley.com; Dennis Cardoza (dcardoza@foley.com); denny rehberg (dennyrehberg@icloud.com); Johnny Amaral (jamaral@westlandswater.org)

Subject: FYI

Attachments: 20160517 Murkowski & Cantwell (support S. 2533).pdf; 5.18.16 Dear Colleague in Opposition to HR 5247.pdf

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Congress of the United States
Washington, DC 20515

May 17, 2016

The Honorable Lisa Murkowski
United States Senator
304 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Maria Cantwell
United States Senator
304 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Murkowski and Cantwell:

We are writing to you as the Chairman and Ranking Member of the Senate Energy and Natural Resources Committee to express our support for Senator Dianne Feinstein's S.2533, the California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act, and to request that you provide assistance to Senator Feinstein in passing this legislation.

Despite improved hydrologic conditions in 2016, many regions in California, including the San Francisco Bay area, the San Joaquin Valley, and southern California, will continue to suffer water supply shortages resulting from four years of prolonged drought and regulations that affect the operations of the State's two major water supply projects. S.2533 provides reasonable solutions to address both the short-term and long-term water supply needs for the State. It does this by investing in water storage, conservation, recycling and desalination, along with innovative water infrastructure financing. These provisions align with Proposition 1, which was passed by California voters in 2014, thus enhancing State law with the coordinated activities of the Federal agencies.

The bill also avoids violating or overriding landmark environmental laws including the Endangered Species Act or the associated biological opinions that govern project operations at certain times of the year, and also upholds and protects state water rights and water law. There is an environmental protection mandate repeated throughout the text, as well as a clear savings clause that explicitly prohibits implementation of the bill a manner that "overrides, modifies, or amends the applicability of the Endangered Species Act . . . or the application of the smelt and salmonid biological opinions."

Moreover, S.2533 makes provision for additional protections for at-risk fish species and provides additional tools to improve the Sacramento San Joaquin Bay-Delta environment. This drought has shown that we must take a holistic look at how we manage the entire ecosystem for improved outcomes for both native species and water supply reliability. This bill looks at a variety of ways to protect imperiled fish species by providing funding to increase gravel rearing and spawning habitat, improve monitoring, reduce the effects of entrainment, reduce the impacts of predation, and improve the agencies' management of cold water.

In drafting S.2533 Senator Feinstein sought input from federal agencies charged with implementing federal statutes intended to protect the fish and wildlife resources, the State of California, public water agencies that serve virtually every region of the State, and conservation organizations interested in protecting wetlands, fish and wildlife, and other environmental resources. S.2533 is thoughtful legislation that protects the environment and will also improve the reliability of water supplies for the State in the short-term and build improved drought resiliency in the long term.

Again, we request that you support Senator Feinstein's efforts to pass this important legislation and make her aware of that support. We stand ready to provide any assistance you need.

Sincerely,



JOHN GARAMENDI
Member of Congress




JIM COSTA
Member of Congress




TONY CARDENAS
Member of Congress



LORETTA SANCHEZ
Member of Congress



SCOTT PETERS
Member of Congress



JUAN VARGAS
Member of Congress



ADAM SCHIFF
Member of Congress



KAREN BASS
Member of Congress

Congress of the United States
Washington, DC 20515

Hold Off on Supporting S. 2533 / H.R. 5247
Significant Concerns Remain on Controversial Provisions

Dear Colleague,

Today the Senate Subcommittee on Water and Power held a hearing on S. 2533, the California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act, just one day after the introduction of its House companion H.R. 5247.

Although the bills offered by Sen. Feinstein and Rep. Garamendi include important investments in much-needed water infrastructure, they also contain dangerous short-term provisions that could have devastating long-term impacts to the states of the West Coast and their fisheries, clean water, and the communities that depend on a healthy environment. As such we strongly urge you to withhold your support, either through cosponsorship or letters that explicitly advocate for these controversial provisions, until those provisions are improved or removed.

A wide coalition of environmental groups, including **American Rivers, Defenders of Wildlife, Earthjustice, Endangered Species Coalition, League of Conservation Voters, Natural Resources Defense Council, and the Sierra Club**, have opposed the bill. Their letter praises the long dedication of Senator Feinstein and her staff on this important issue, and their support of the positive long-term provisions in the legislation, but it concludes that “several specific provisions in this title would authorize and direct operations of the state and federal water projects that are inconsistent with protections for salmon and other endangered species required under existing biological opinions.”

Last week, the **Pacific Fishery Management Council** also released an analysis of the bill that raises serious concerns about its impact on California’s wild salmon populations. The PFMC is an agency created by federal law charged with regulating ocean fishing off the coasts of California, Oregon, and Washington. Its members include fishery experts from state and federal fish agencies along with representatives of key fishing groups. Specifically, the PFMC letter states:

- The bill would “cause irreparable harm to California salmon and the commercial, recreational, and tribal fishing communities that depend on them.”
- The bill’s provisions are “particularly dangerous to salmon at a time when juvenile survival has been disastrously low after two years of poor temperature and flow conditions in the rivers.”
- The bill “authorizes weaker protections for salmon and other endangered species” by allowing increased pumping from the Delta.

Letters of opposition have also been sent by the American Sportfishing Association (ASA), the Alaska Longline Fishermen's Association (ALFA), and over 200-salmon related businesses in Alaska, Washington, Oregon, and California.

Until these widespread concerns over the bill's impacts to salmon and the fishing industry are alleviated, we respectfully request that you refrain from offering your full support of the bill.

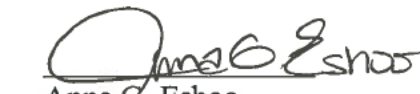
Sincerely,



Peter DeFazio
Member of Congress



Jared Huffman
Member of Congress



Anna G. Eshoo
Member of Congress



Jerry McNerney
Member of Congress



Kurt Schrader
Member of Congress



Mike Thompson
Member of Congress



Barbara Lee
Member of Congress



Mark DeSaulnier
Member of Congress



Doris Matsui
Member of Congress

From: Jason Peltier

Sent: Saturday, May 21, 2016 6:41 AM

To: Tom Birmingham; Johnny Amaral; Dennis Cardoza; David Bernhardt; Ed Manning; Carolyn Jensen

Subject: Fwd: Delta Flows: Why We Don't Support the Garamendi/Feinstein Drought Bills

Restore the Delta attacks.

News from Restore the Delta

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Delta Flows: May 20, 2016

[Read full newsletter at our website](#) **or below.**

8 Reasons We Don't Support the Garamendi/Feinstein Bills

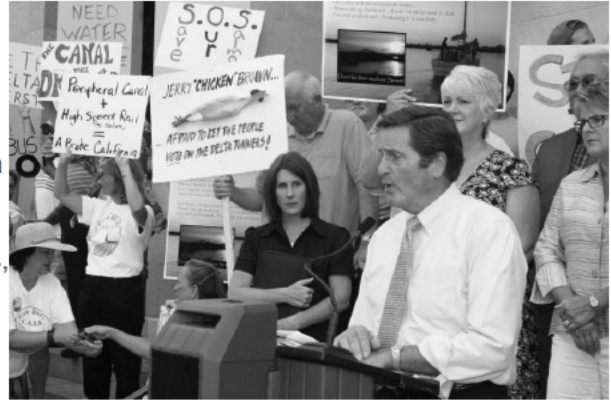
By: Barbara Barrigan-Parrilla

As our readers are well aware Senator Dianne Feinstein's drought bill (SB 2533) now has a companion bill in the House of Representatives. Congressman John Garamendi introduced HR 5247 this week which completely mirrors Senator Feinstein's legislation. What our readers do not know is that Congressman Garamendi has attempted a full court press on Restore the Delta to support this legislation beginning back in February.

When Congressman Garamendi released his draft legislation, he approached Restore the Delta to support the bill. After reading the bill and being in conversation with environmental

experts, fishery experts and Delta water district attorneys, we concluded that HR 5247 was another bad water extraction bill aimed at delivering water from the Delta to just 3 of California's 58 drought stricken counties. This acceleration of water extraction for the Delta negates the conservation elements touted by Congressman Garamendi and Senator Feinstein.

However, because we believe in collaboration and dialogue, Restore the Delta organized a call between Congressman Garamendi and local Delta water attorneys, county water experts, retired elected officials, environmentalists, and fishery experts. Our concerns over the bill were conveyed clearly, and suggested language changes were



submitted to Congressman Garamendi. About a week after the meeting, I personally reached out to his staff to see what would happen next. I was told that the Congressman had the suggested language changes and would be handling the legislation.

From that first week in March, until the Congressman announced the release of HR 5247 on May 16th, we never heard another word from the Congressman or his staff.

Monday morning, Restore the Delta completed a rapid read of the bill and doubled back with our environmental colleagues to confirm our findings. HR 5247 is a mirror copy of Senator Feinstein's S 2533. Our concerns were not addressed; and a respected Congressional leader from the Delta has taken on the cause of accelerated water extraction from a collapsing Bay-Delta estuary.

Since the release of the bill, we heard directly from the Congressman himself and several of his staff members. We appreciate their efforts to resume discussion of the bill and believe firmly that sometimes you have to talk your way through a disagreement. However, Restore the Delta has been told by the Congressman verbally and more recently in writing that we are not serious about solving California's water problems if we fail to support his position. He is wrong about that, but we anticipate he will release a letter with a statement referring to groups that don't want solutions.

This is where the metaphorical boxing gloves come off.

We cannot and will not support Congressman Garamendi or Senator Feinstein's bills for increasing water extraction from the Delta for the following reasons:

- 1) We are entering the fifth year of drought and Delta water quality protections were rolled back 15 times over the last two years. Water quality standards for the Delta are already violated on a regular and continuous basis.
- 2) The State Water Resources Control Board and the United States Environmental Protection Agency have failed to update the Delta Water Quality Control Plan in a timely manner. They are 20 years behind with updating standards, and litigation is now moving forward, spearheaded by our Bay Area environmental colleagues.
- 3) All Delta fisheries are in serious decline due to 30 years of over pumping compounded by five straight years of drought. Remember, the pumps were never shut off one day during these last five years. Pumping was slowed down only 3% of the time to protect fisheries in 2014 and 2015. Low pumping levels were set in place because the estuary was dangerously close to becoming salted up due to lack of inadequate outflows into the San Francisco Bay, threatening water quality for Metropolitan Water District of California. Fishery management agencies are enforcing pumping restrictions more closely this year because they are on the verge of rendering species extinct.
- 4) The [Pacific Fisheries Management Council review of the Feinstein/Garamendi bill](#) lay to rest the assertions of Congressman Garamendi that their bills are scientific and protective of salmon.
- 5) The complex provisions of Title 3 of the bill are likely to legislatively override existing Endangered Species Act biological opinions protecting salmon, Delta smelt and other endangered species.
- 6) Congressman Garamendi's asserts to us that "monitoring equipment" can determine if Delta smelt are near the export pumps. This is inaccurate. Fishery experts have made it clear to the Congressman that no equipment can access with scientific certainty as to whether Delta smelt can be tracked due to their perilously low numbers. Remember Westlands Water District and Metropolitan Water District were busy in Washington D.C. in

2015 attempting to delist the Delta smelt in an attempt to lift Delta pumping restrictions. The Delta smelt—that tiny, tiny fish—is our region’s protection from full water exports that will destroy water quality beyond repair for every other commercial, business, human, wildlife and recreational use.

7) The Independent Science Panel recently completed a rigorous analysis of the Biological Assessment for California WaterFix. Their findings apply to the Congressman’s bill: the scientific findings on the outcomes of diverting more water from the Delta are very uncertain. To pass this legislation off as based on sound science is simply disingenuous. Fishery experts are clear that we cannot determine with accuracy if Delta smelt are near the pumps. Moreover, the Congressman’s overall plan for the Delta and water management will fill the proposed Delta tunnels with the 1.3 million additional acre feet needed to make them financially viable for the water ~~contractors~~ extractors.

8) The courts agree with Restore the Delta and our partners, not Congressman Garamendi, regarding what the Delta needs. Yesterday, contrary to the Delta Stewardship Council’s claim that the court upheld the Delta Plan except for two needed refinements, Sacramento Superior Court Judge Michael Kenny put a bullet in the heart of the Delta Plan. Judge Kenny ruled that the Delta Plan failed to include quantified or otherwise measurable targets for reducing Delta reliance, reduced environmental harm from invasive species, restoring more natural flows, and increased water supply reliability, in accordance with the Delta Reform Act. He also ruled that the Plan failed to provide a flow policy that includes “quantified or otherwise measurable targets” and failed to promote options for water conveyance and storage systems. In other words, Congressman Garamendi’s drought legislation is seeking to undo what was described as necessary in a California court this week – flow policies that reduce Delta reliance!

For ten years, Restore the Delta, the Environmental Water Caucus, and the broader environmental community have written extensively about California reaching the end of an economic era based on water extraction. It is common knowledge that the [Delta watershed is oversubscribed five times before we factor in extended drought from climate change.](#)

To place our recommended solutions all in one easy-to-find place, [the Environmental Water Caucus has published its findings for over eight years, calling for water recycling, conservation, storm water capture, groundwater cleanup, cistern development, and watershed restoration](#). The Pacific Institute is the international leader on the soft path of water management for dealing with declining watersheds in a changing climate. [They criticized proposals from Congress to wipe out decades of progress on sustainable water management with these drought bills](#).

Our partners at Friends of the River have written numerous letters on behalf of the Environmental Water Caucus and other environmental groups to CA WaterFix, the Resources Agency, Federal agencies, and the State Water Resources Control Board, insisting that they evaluate alternatives to California water management in lieu of the Delta tunnels.

NRDC has written extensively on the possibilities of creating millions of acre feet of new water in California through these same conservation, water technology practices.

Restore the Delta, in a more humble way, has pushed its [Better Solution video](#) and platform to government agencies, elected officials, and the press since 2012. In fact, our [2013 documentary Over Troubled Waters](#), covers the conservation alternatives to excessive Delta exports and the Delta tunnels.

Yet, despite our coalition's repeated requests, state officials have never evaluated these alternatives in good faith. And now it galls us thoroughly that one of our own Delta Congressmen not only ignores our years of extensive work putting forward constructive and genuine solutions, but threatens to paint us as not offering a solution because we refuse to fall in line with his bad legislation.

California is reaching the end of an economic era based on water extraction. Congressman Garamendi, Senator Feinstein, and Governor Brown have been surrounded by advisors and supporters who fail to grasp that water is a limited resource. In order for California to achieve a sustainable economy and environment, water management can no longer be based on extraction. The old way of doing things will not hold, and our leaders of the last forty years sadly cannot seem to adapt to this changing world.

**Take Action on
Garamendi's &**

Train the Water Advocate & Open House

Drop by or sign up! We will be holding a 3-day open house and advocacy training. Participants can drop by at their own convenience during these dates & times or sign up for more formal classes. [Details.](#)

Feinstein's Drought Bills!

Now that you know why you should oppose these bills, take action. Send a phone call, e-mail, or tweet! [Details.](#)

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From: Johnny Amaral

Sent: Monday, May 23, 2016 6:03 AM

To: Mike Burns; Ed Manning; Carolyn Jensen; David Bernhardt; Dennis Cardoza; Denny Rehberg; Catherine Karen; Ryan A. ' 'Smith

Subject: I'm flying to DC for the Drainage bill hearing

Unfortunately we will not be having a call this morning.

Best,

Johnny Amaral

From: Bernhardt, David L.

Sent: Monday, May 23, 2016 6:56 PM

To: Thomas W. (Tom) Birmingham Esq.; Johnny Amaral

Subject: Fwd: DOI Testimony and Disclosure

Attachments: Westlands and ND San Luis Drain Settlements Testimony.Final (2).docx; ATT00001.htm; Testimony.HR ____ Blackfeet Water Rights Settlement Act of 2016.Final.docx; ATT00002.htm; disclosure form - bezdek.doc; ATT00003.htm

David Bernhardt

Begin forwarded message:

From: "Weaver, Kiel" <Kiel.Weaver@mail.house.gov>

Date: May 23, 2016 at 8:29:08 PM EDT

To: "Wong, Bryson" <Bryson.Wong@mail.house.gov>, "Bernhardt, David L." <DBernhardt@BHFS.com>

Subject: FW: DOI Testimony and Disclosure

From: Adler, Ann [aadler@usbr.gov]

Sent: Monday, May 23, 2016 5:46 PM

To: Weaver, Kiel; Byson.Wong@mail.house.Gov; Muirragui, Matthew; Semanko, Alex

Cc: Mathew Maucieri

Subject: DOI Testimony and Disclosure

All -- Attached are the two testimony documents for DOI witness John Bezdek as well as the Committee's disclosure form.

Ann

--

Ann Adler

202-513-0570

Chief, Congressional and Legislative Affairs
Bureau of Reclamation, Dept. of the Interior

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**Statement of John Bezdek
Counselor to the Deputy Secretary
U.S. Department of the Interior
Before the
U.S. House of Representatives
Committee on Natural Resources
Subcommittee on Water, Power and Oceans
On HR 4366 (Valadao) and HR 5217 (Costa) – The San Luis Unit Drainage Resolution Acts
May 24, 2016**

Chairman Fleming, Ranking Member Huffman, I am John Bezdek, Counselor to the Deputy Secretary at the Department of the Interior. I am pleased to provide the views of the Department of the Interior (Department) on HR 4366, the San Luis Unit Drainage Resolution Act. The Department supports the goal of providing a long term drainage solution in the San Luis Unit. The Department notes that HR 4366 would authorize the implementation of a settlement of litigation with the Westlands Water District (Westlands) and provide a long term drainage solution and therefore supports the bill. The Department is also aware of the Subcommittee's interest in HR 5217, which authorizes the Westlands settlement, but additionally authorizes a related agreement (Northerly District Agreement) with three water districts in the northern reaches of the San Luis Unit service area. I will address HR 4366 first.

For over twenty-eight years, there has been litigation surrounding drainage for lands served by the San Luis Unit (SLU) of the Central Valley Project (CVP). Currently, the Bureau of Reclamation is under a court order to provide drainage services to these impaired lands and the only drainage alternative that has undergone environmental and feasibility review will cost approximately \$3.8 billion in 2015 dollars. If settlement is not authorized, significant amounts of funding will be directed towards providing drainage services. In order to meet this court-ordered mandate, the Department may have to significantly reduce or potentially eliminate other programs.

The San Luis Unit (SLU) is part of the Bureau of Reclamation's (Reclamation) Central Valley Project (CVP) in California. Congress authorized the SLU on June 3, 1960, under Public Law No. 86-488. As originally authorized, the Act contemplated facilities to remove drainage water from irrigated lands to achieve a long-term, salt and water balance necessary to maintain sustainable agriculture in the SLU. Initial plans for drainage facilities included the San Luis Interceptor Drain (Drain), which would have collected drainage water and conveyed it for discharge into the Bay-Delta. By 1975, an 82-mile segment of the Drain (terminating at Kesterson Reservoir) had been constructed, which provided drainage to a portion of Westlands. Litigation over the United States' drainage obligation commenced shortly after the United States halted use of the San Luis interceptor drain and plugged all Federal drainage facilities in the SLU following the discovery of embryonic deformities of aquatic birds at Kesterson Reservoir. Kesterson Reservoir was emptied and, since that time, the United States has not resumed

drainage service to Westlands. These details are a matter of public record, and my statement will summarize only the facts relevant to the legislation before the subcommittee today.

Following the closure of Kesterson Reservoir and the plugging of the Drain, two lawsuits were filed regarding the provision of drainage. *Firebaugh Canal Water District v. United States* was filed in 1988 by two water districts located outside and “downslope” of the SLU. The action was partially consolidated with *Sumner Peck Ranch, Inc. v. United States*, a similar action brought in 1991 by approximately 100 landowners located within the SLU. In 1995, following a trial, the district court entered a partial judgment that the Secretary of the Interior’s (Secretary) obligation under the San Luis Act to provide drainage was not excused or rendered impossible. In 2000, the Ninth Circuit largely affirmed the partial judgment, and on remand the district court entered an injunction (2000 Order Modifying Partial Judgment) against the Secretary requiring Reclamation to provide drainage service “without delay” to the SLU. In 2002, the United States settled the *Sumner Peck* plaintiff’s claims.

In compliance with the 2000 Order Modifying Partial Judgment, the Department developed a Plan of Action outlining the steps it would follow to implement a drainage solution for the SLU.

Following completion of an environmental impact statement, Reclamation issued a Record of Decision (ROD) in March 2007, in which Reclamation selected a drainage alternative that met the drainage service requirements of the district court’s injunction. The Department also prepared and submitted to Congress a feasibility report, concluding that the cost of implementing the selected alternative would be approximately \$2.7 billion (now \$3.8 billion in April 2015 dollars). That amount exceeds the remaining appropriations ceiling originally authorized for construction of the SLU. As a result, the alternative selected in the ROD cannot be fully implemented under existing law. As part of the on-going litigation, the Department advised the district court in November 2009 that, while it could not implement the entire ROD, sufficient appropriation ceiling remained to allow it to construct one subunit of drainage facilities within a portion of Westlands.

Reclamation began implementing the selected drainage plan in a subunit of Westlands in 2010 and in the Northerly Area of the SLU with construction of the Demonstration Treatment Plant in 2012, pursuant to a court ordered control schedule. Beyond that subunit, however, the Department remains unable to continue implementation of the ROD without additional Congressional authorization. In 2012, the district court entered final judgment against the *Firebaugh* plaintiffs dismissing their remaining claims while maintaining jurisdiction to supervise compliance with the 2000 injunction requiring Reclamation to provide drainage service to drainage-impaired lands in the San Luis Unit.

On September 2, 2011, individual landowners within Westlands Water District filed suit in the Court of Federal Claims alleging that the failure by the United States to provide drainage service to their lands resulted in a physical taking of their property without just compensation in violation of the Fifth Amendment. Plaintiffs brought their suit as a class action on behalf of all landowners located within Westlands “whose farmlands have not received the necessary drainage service the

United States is required to provide under the San Luis Act....” A plaintiff class has not yet been certified. A motion by the United States seeking dismissal of the takings claim was denied on September 20, 2013¹. The Opinion contains language sharply critical of the United States’ delay in providing drainage to Westlands. The Court of Federal Claims has stayed this litigation to allow settlement negotiations to proceed, but is requiring the submission of regular status reports on the progress of the discussions. While the complaint does not specify a dollar amount for damages, estimates suggest that federal liability for just compensation could range from zero to over \$2 billion.

On January 6, 2012, Westlands filed its own suit against the United States also in the Court of Federal Claims, alleging that the government’s failure to provide drainage service to the Westlands service area constituted a breach of Westlands’ 1963 Water Service and 1965 Repayment contracts (including the interim renewal of those contracts) with the United States. The United States moved to dismiss Westlands’ claims. On January 15, 2013, the Court of Federal Claims granted the United States’ motion to dismiss, ruling that none of the contracts contained an enforceable promise to provide drainage to Westlands.² Westlands has appealed to the Federal Circuit, and briefing on the appeal is complete. On December 2, 2015, the Federal Circuit granted a stay through January 20, 2017.

The Westlands Settlement resolves *Westlands Water District v. United States*, the remaining breach of contract case relating to the United States’ drainage obligation. The Settlement also provides for the vacatur of the 2000 Order Modifying Partial Judgment in *Firebaugh Canal Water District v. United States*, allowing the U.S. to avoid the costs of meeting its statutory and court-ordered drainage obligation, currently estimated to be \$3.8 billion. The Settlement further provides a framework for resolving *Michael Etchegoinberry, et. al. v. United States*, the Fifth Amendment takings case brought by individual landowners within Westlands.

Interested parties have commented on the 2010 letter from the then-Commissioner of the Bureau of Reclamation to Senator Feinstein focusing on how the key legislative elements outlined in that letter differ from the Settlement ultimately negotiated by the parties. While the letter outlined key elements of a long-term drainage strategy that the Administration would support if Congress were to consider authorizing a resolution of the drainage issues in the SLU, the letter was not an Administration proposal for legislation. The Department’s belief was that a legislative response was needed and the letter was an effort to facilitate Congress moving forward with a resolution. However, Congress took no action on the legislative elements the Department indicated it could support. Therefore, the Administration explored a negotiated resolution of the drainage problem with Westlands as a response to the projected costs of construction of drainage service facilities in Westlands under control schedules which had been submitted to the district court under the

¹ *Etchegoinberry, et. al. v. United States*, 114 Fed. Cl. 437 (2013).

² *Westlands Water Dist. v. United States*, 109 Fed. Cl. 177 (2013).

partial judgment and injunction. Moreover, Reclamation has grown increasingly concerned about the potential financial impact of compliance with the judgment on its ability to meet other priority programs. Lack of legislation by Congress, new legal challenges and financial concerns all played a significant role in the Department's decision to enter into settlement negotiations with Westlands and ultimately into the terms of the Settlement itself.

Benefits of the Westlands Settlement to the United States:

- If enacted into law, the proposed legislation would amend the San Luis Act to relieve the Department from all drainage obligations imposed by that statute, including implementation of the 2007 ROD, the present cost of which is estimated to be \$3.8 billion.
- Westlands agrees to dismiss *Westlands v. U.S.*, the breach of contract litigation, and would join the U.S. in petitioning for vacatur of the 2000 Order Modifying Partial Judgment in the *Firebaugh* case, which presently requires Reclamation to implement drainage service.
- The Settlement establishes a framework for resolving all individual landowner claims in the *Etchegoinberry* takings case. Specifically, Westlands would participate in this case for settlement purposes and would provide compensation to affected landowners. Otherwise, potential exposure to Federal taxpayers from an adverse judgment could be as high as \$2 billion.
- Westlands agrees to release, waive and abandon all past, present and future claims related to drainage, and agrees to indemnify the United States for any and all claims from individual landowners relating to the provision of drainage service or lack thereof within its service area.
- Westlands agrees to permanently retire at least a minimum of 100,000 acres of lands within its boundaries utilizing those lands only for the following purposes:
 - a. management of drain water, including irrigation of reuse areas;
 - b. renewable energy projects;
 - c. upland habitat restoration projects; or
 - d. other uses subject to the consent of the United States.
- The Settlement transfers the legal obligation to manage drainage for lands within Westlands service area from the United States to Westlands. The United States will retain the ability to enforce this obligation through a contract term conditioning the U.S. obligation to make water available to Westlands upon its compliance with State and Federal law.
- Westlands agrees to cap its CVP water deliveries at 75 percent of its contract quantity. Any CVP water which Westlands would otherwise receive above this 75 percent cap would become available to the United States for other CVP authorized purposes.

- Westlands agrees that all drainage water will be disposed of within Westlands' district boundaries and that no drainage water will be discharged outside of Westlands' boundaries.
- As part of the Settlement, the United States would enter into a water service contract with Lemoore Naval Air Station to provide a quantity of CVP water to meet the irrigation needs of the Naval Air Station associated with air operations, and Westlands agrees to wheel CVP water made available to Lemoore.

Benefits of the Westlands Settlement to Westlands

- Westlands will be relieved of current, unpaid capitalized construction costs for the CVP, the present value of which is currently estimated to be \$295 million. Westlands will still be responsible for operation and maintenance costs, will pay restoration fund charges pursuant to the Central Valley Project Improvement Act and will be responsible for future CVP construction charges associated with new construction of the project (e.g. Folsom Reservoir Safety of Dams modifications).
- The Secretary will convert Westlands' current 9(e) water service contract to a 9(d) repayment contract consistent with existing terms and conditions and all terms of the Settlement. As a "paid out" project, the benefit of this conversion gives the district a contract with no expiration term, consistent with other paid out Reclamation projects. However, the contract will contain terms and conditions that are nearly identical to those in the current 9(e) contract, including the shortage provision.
- Westlands will be relieved of Reclamation Reform Act (RRA) (96 Stat. 1269) provisions relating to acreage limitations and full cost pricing. The RRA grants this relief on its face to projects that are considered "paid-out." Additionally, the tiered pricing provisions are triggered when a district receives 80 percent of its contract quantity, and as part of this settlement, Westlands water deliveries will be capped at 75 percent of its contract quantity.
- Westlands will also take title to certain facilities within its service area that it currently operates.

Several aspects regarding the obligation to provide drainage service were evaluated in determining the overall net benefit to the United States. Included in this consideration were avoided drainage construction costs, repayment to the United States of reimbursable costs, relief from Reclamation Reform Act fees, and unpaid CVP capital obligations. The United States would also benefit from avoided financial liability in the *Etchegoinberry* takings litigation, which could be as high as \$2 billion.

The Department recognizes that Westlands can realize efficiencies, such as local or in-house labor, reduced travel, and different purchasing requirements than Reclamation, that reduce its cost to implement drainage as compared to the costs that Reclamation would incur if

Reclamation implemented the 2007 ROD. Nevertheless, while the scope of the drainage problem may have lessened in recent years due to drought and irrigation efficiencies, the Department is of the view that there will continue to be a need for substantial financial investment to alleviate drainage concerns in the San Joaquin Valley in the long term. While California has experienced a series of dry years recently, the historic hydrologic record indicates that wet cycles will return and the drainage challenge in the San Luis Unit will increase. With Westlands responsible for drainage within its boundaries, there is more incentive to increase irrigation efficiencies should new technology be developed in the future, which is a component of managing drainage that is largely outside of Reclamation's control. It should also be noted that Westlands will be responsible for implementing drainage in perpetuity. Costs will rise as drainage actions are implemented many years and potentially, decades into the future.

It is the Department's belief that the Settlement results in a savings to the American taxpayers when compared to the costs that would occur without the terms agreed to in the Settlement. Moreover, we are also of the view that failure to settle on-going litigation will place the Department's ability to address the effects of the ongoing drought in both the short term and long term at risk due to the potential of significant amounts of appropriations being expended on providing drainage service. As a practical matter, should our efforts to settle litigation with Westlands fail, funding for programs throughout Reclamation are likely to be reduced in order for Reclamation to adequately fund the Control Schedule.

Were the Settlement not to be approved by Congress, Reclamation would still be obligated to implement drainage service to all drainage-impaired lands in the SLU as required under that Act and the injunction. To fully carry out that obligation, Congress would need to increase the appropriations ceiling imposed by the San Luis Act and appropriate adequate funds to complete the work. Some members of the public and this subcommittee have expressed concerns with many aspects of the Settlement, and the Department appreciates those concerns and would note that this settlement is a unique situation stemming, in part, from a specific set of judicially-imposed, legal requirements and should not be seen as precedential for future settlements. But it is the Department's view that in this specific case, the years of negotiation that have led to the Settlement and the introduction of HR 4366 have produced the best possible outcome for the people of California, the environment, and the American taxpayer. With the enactment of HR 4366, nearly three decades of litigation, enormous potential liabilities for the United States, and a longstanding environmental problem will be comprehensively resolved.

As stated above, the Department is also aware of the provisions of HR 5217 which would authorize the Northerly District Agreement. The Department believes that agreement is consistent with, and complementary to, the Westlands settlement. However, the Office of Inspector General at the Department of the Interior is currently involved in an investigation, pending which, the Department is withholding a decision on the Northerly District Agreement and has no position on HR 5217 at this time. This concludes my written statement. I would be pleased to answer questions at the appropriate time.

**Statement of John Bezdek
Counselor to the Deputy Secretary
United States Department of the Interior
Before the
Subcommittee on Water, Power and Oceans
Committee on Natural Resources
House of Representatives
On Discussion Draft - HR ____ - The Blackfeet Water Rights Settlement Act of 2016
May 24, 2016**

Chairman Fleming, Ranking Member Huffman and Members of the Subcommittee, I am John Bezdek, Counselor to the Deputy Secretary at the Department of the Interior (Department). I am here today to provide the Department's views on the discussion draft HR ____, the Blackfeet Water Rights Settlement Act of 2016, which would provide approval for, and authorizations to carry out, a settlement of the water rights claims of the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana. The Department is supportive of the discussion draft HR ____, the Blackfeet Water Settlement Act of 2016, and looks forward to working with the Committee to consider this legislation.

The Department supports resolving Indian water rights claims through negotiated settlement. Our general policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement.

Disputes over Indian water rights are expensive and divisive. In many instances, Indian water rights disputes, which can last for decades, are a tangible barrier to progress for tribes, and significantly, hinder the rational and beneficial management of water resources. Settlements of Indian water rights disputes break down these barriers and help create conditions that improve water resources management by providing certainty as to the rights of all water users who are parties to the dispute. That certainty provides opportunities for economic development, improves relationships, and encourages collaboration among neighboring communities. This has been proven time and again throughout the West as the United States has pursued a policy of settling Indian water rights disputes whenever possible. Indian water rights settlements are also consistent with the Federal trust responsibility to American Indians and with Federal policy promoting Indian self-determination and economic self-sufficiency.

Today, implementing existing settlements and reaching new agreements is more important than ever given the need for water on many Indian reservations and throughout the West and the

uncertainty regarding its availability due to drought, climate change, and increasing demands for this scarce resource.

The Treaty with the Blackfeet in 1855 encompassed some 27,500 square miles of Blackfeet tribal lands in what was to become Montana. The discovery of gold in the early 1860s brought the first wave of non-Indians into the territory, along with increasing pressure to open the Reservation to non-Indian settlement. A series of executive orders reduced and reconfigured the Reservation and then in 1888, it was divided into three separate and smaller reservations: the Fort Belknap Reservation, the Fort Peck Reservation, and the Blackfeet Reservation. The Blackfeet Reservation was further diminished in 1895 (Agreement of September 19, 1895, ratified on June 10, 1896, 29 Stat. 321, chapter 398, hereafter “1895 Agreement”), when the United States purchased from the Tribe 800,000 acres of land along the western boundary of the Reservation.

In the 1895 Agreement, the United States promised that the Reservation would not be allotted without ‘the consent of the adult men of the Tribe’ (Article V), and that if the government were to build a canal to control the abundant supply of water available seasonally in the St. Mary River, the canal would be constructed to provide irrigation water for the Reservation (Article III and Meeting Minutes). Within just a few years, the Reservation was opened to allotment; construction of a canal to capture the supply of the St. Mary River had begun but the canal was designed and constructed to divert St. Mary water off of the Reservation for the benefit of the Milk River Project, located some 200 miles away, and not for the benefit of the Tribe. In 1909, the United States entered into a treaty with Canada apportioning the waters of the St. Mary and Milk Rivers. This Treaty did not specifically address the water rights of the Blackfeet Nation and other Tribes, even though it was concluded just after the United States Supreme Court handed down its 1908 decision in *Winters v. United States* - a case involving the Milk River, which established the doctrine of Federal Indian reserved water rights.

The Tribe’s water rights have been fought over for more than 100 years, as reflected in approximately 14 court cases and congressional proceedings addressing directly or indirectly the use and control of the Reservation’s water resources. Modern efforts to quantify the Tribe’s reserved water rights began in 1979 when the State of Montana (State) filed suit in State court as part of the statewide water rights adjudication proceeding. At the same time, the United States filed a case in Federal court in Montana to adjudicate the Tribe’s reserved water rights claims. The question of jurisdiction that arose as a result of the two lawsuits was decided in 1983 by the United States Supreme Court, which held that state court was the appropriate forum to adjudicate tribal reserved water rights pursuant to the McCarran Amendment, 43 U.S.C. § 666.¹

¹ *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). The Federal Court action has been stayed since 1983 pending the outcome of the State adjudication.

In 1989, the Tribe initiated negotiations with the Montana Compact Commission and in 1990 the Department appointed a Federal Negotiation Team to assist in achieving a negotiated settlement of the Tribe's reserved water rights claims. The State and the Tribe reached an agreement in 2007, in the form of a Compact, which the Montana Legislature approved in 2009. Federal legislation to authorize the Compact was first introduced in 2010. Since then the Administration has been negotiating with the Tribe and the State to resolve important Federal concerns relating to cost, cost sharing, Federal interests, and Federal responsibilities. Those negotiations lowered the Federal cost of the settlement by approximately \$230 million.

The Blackfeet Water Rights Settlement will provide many benefits, as it resolves all outstanding Blackfeet water claims, quantifies a tribal water right to more than 750,000 acre-feet of surface water and nearly all groundwater on the Reservation, and funds the construction and rehabilitation of water related infrastructure on the Reservation for the benefit of the tribal community. Federal settlement funding will provide lasting benefits for the Tribe and its members, by protecting public health and creating substantial numbers of temporary and permanent employment opportunities on the Reservation, including opportunities in the construction, water management, renewable energy, agricultural, recreation, and tourism industries. The settlement also includes a process that will enable the Blackfeet Tribe and the Fort Belknap Indian Community to resolve a conflict that exists between them over relative rights to use the Milk River. The settlement process provides funding to support the Tribes' efforts to reach a resolution, and authorizes the Secretary to establish criteria to provide for such an arrangement if the Tribes do not reach a successful sharing arrangement. This settlement is a crucial and long-awaited step towards achieving the permanent tribal homeland promised to the Blackfeet Tribe in the treaties and agreements ratified by Congress between 1855 and 1896 that serve as the foundation of the relationship between the Tribe and the United States.²

Settlement funding focuses primarily on Federal programmatic responsibilities, including funding for dam safety repairs and deferred maintenance for Bureau of Indian Affairs facilities on the Reservation;³ increasing water storage capacity for irrigation and other economic activities on the Reservation;⁴ construction, rehabilitation, and expansion of the Blackfeet Regional Water System to provide safe, clean drinking water to all of the Reservation's major population centers;⁵

² *Treaty with the Blackfeet*, 1855, Oct. 17, 1855, 11 Stat., 657, Ratified Apr. 15, 1856, Proclaimed Apr. 25, 1856, *Act of April 15, 1874* (18 Stat. 28, chapter 96), *Agreement of 1888*, ratified by the Act approved May 1, 1888 (25 Stat. 113), *Agreement of 1895*, dated September 26, 1895, ratified by the Act approved June 10, 1896 (29 Stat. 321, 353), Criteria and Procedures, No. 10.

³ Indian Dam Safety Act of 1994, 25 U.S.C. § 3801 et seq.

⁴ 25 U.S.C. §13, "the Secretary of the Interior . . . shall expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians . . . for development of water supplies." (Emphasis supplied).

⁵ It is "the policy of the United States that all Indian communities and Indian homes, new and existing be provided with safe and adequate water supply systems...as soon as possible." 25 U.S.C. §1632(a)(5).

improving tribal irrigation projects with on-farm improvements for tribal trust lands;⁶ and establishing the Blackfeet Tribal Water and Energy Office to support self-determination and enhance the Tribe's capacity to manage its trust resources.

The Blackfeet Reservation is set up against the Rocky Mountains and possesses some of the most spectacular scenery in the United States. It provides significant habitat for countless wildlife and fish species, including many protected species. Reservation fisheries are world renowned. Yet, the Reservation struggles with high unemployment, extreme poverty, and a lack of employment opportunities. The Reservation ranks as the 5th poorest reservation in the United States. The American Community Survey of 2014 calculates the poverty rate on the Reservation at nearly 40 percent, with unemployment at more than 20 percent, and the share of the population that did not work in the previous 12 months even higher, at 39.1 percent. In addition to these bleak statistics, at least 30 percent of Reservation households live in housing that lacks complete plumbing or kitchen facilities and more than 80 percent of school age children are eligible for free or reduced school lunches.

The improvements to irrigation infrastructure on the Reservation should have a major beneficial impact on the tribal economy, which is a rural economy dependent on farming and ranching and associated hay and alfalfa farming operations. Settlement funding will also provide vital improvements for the Tribe's farming and ranching activities, including the significant bison herds maintained by the Tribe. Such activities are an important source of tribal revenues and an important source of jobs for tribal members. Settlement funds will also support improvements to tribal lakes and fisheries, providing important habitat improvements as well as recreational and economic development opportunities that take advantage of the natural environment. Such activities will contribute to increased tribal revenues and allow the Tribe to provide better and more comprehensive services to Tribal members.

The Blackfeet Water Settlement funding may add significant temporary and permanent job opportunities for tribal members on the Reservation. These benefits will derive from Federal spending on important water related infrastructure projects and improvements.

The settlement will also provide water supplies and increased water storage capacity which will help the Tribe establish better economic conditions to support a viable homeland for its members. The funding to construct, rehabilitate, and expand the Tribe's municipal water system will ensure all major population centers on the Reservation have reliable and safe drinking water supply for 50 years into the future. Currently, the Tribe experiences school closures and business disruptions because of the unreliability of municipal water systems, and has had to operate under a "boil order" for more than a decade in a major population center until the Tribe was able to cobble together grants, loans, and its own funds to update part of its system.

⁶ 1907 Blackfeet Allotment Act

The Blackfeet Water Settlement also provides important benefits to American taxpayers and the State of Montana. The final quantification of the Tribe's reserved water rights will bring stability for all water users within the State and will provide the certainty and reliability necessary to sustain the economy of the State without disruption. As originally proposed to this Administration, the Blackfeet Water Settlement included Federal funding of more than \$650 million. The Department scrutinized every Federal dollar in the original proposal, and worked closely with the Tribe and the State to reduce the overall cost of the settlement by well over \$200 million and increase State cost share. The State's direct contribution to the Blackfeet Water Settlement is now \$49 million, a substantial and appropriate direct state cost share. While the current Blackfeet Water Settlement authorizes substantial Federal funding requirements through fiscal year 2025, we have confirmed that this level of funding is necessary in order for the Tribe to develop its capacity to manage and develop its water resources.

Important Federal proprietary interests in Glacier National Park (Park), the Lewis and Clark National Forest (Forest), the Bowdoin National Wildlife Refuge, and the Milk River Project will be protected by the settlement. The Park and Forest will enjoy protection of important instream flows with early priority dates. Federal funding also will address important obligations of the Bureau of Reclamation on the Reservation and provide compensation to the Tribe for deferring water use

Notably, the Settlement will resolve or provide a process for resolving disputes and any Federal liability regarding the Milk River Project. Reclamation's use and occupancy of Reservation lands for the St. Mary Canal and other features of the Milk River Project has been disputed by the Tribe for more than 100 years. Under the process described in section 7 of the Settlement Act, the dispute will be resolved, and the parties' legitimate interests will be protected going forward on a permanent basis. Additionally, the Tribe has filed objections to the Milk River Project water rights claims that are pending in the Montana general stream adjudication. The Tribe will withdraw its objections in certain basins at the request of the United States. The United States will realize tremendous value from the resolution of these two disputes in addition to the consideration from the Tribe's waivers of legal claims for damages relating to its water rights and water resources. Avoidance of these potential money damage awards against the United States represents additional and very significant benefits for the Federal Government and the American taxpayer.

That concludes my written statement. I would be pleased to answer questions at the appropriate time. #

COMMITTEE ON NATURAL RESOURCES
114th Congress Disclosure Form
As required by and provided for in House Rule XI, clause 2(g)(5)

Subcommittee on Water, Power and Oceans
Legislative Hearing:

- **H.R. 4366** (Rep. David Valadao), To affirm an agreement between the United States and Westlands Water District dated September 15, 2015, and for other purposes. *“San Luis Unit Drainage Resolution Act”*;
- **H.R. 5217** (Rep. Jim Costa), To affirm "The Agreement Between the United States and Westlands Water District" dated September 15, 2015, "The Agreement Between the United States, San Luis Water District, Panoche Water District and Pacheco Water District", and for other purposes. *“San Luis Unit Drainage Resolution Act”*; and
- Discussion draft of **H.R. _____**, To authorize and implement the water rights compact among the Blackfeet Tribe of the Blackfeet Indian Reservation, the State of Montana, and the United States, and for other purposes. *“Blackfeet Water Rights Settlement Act of 2016”*

May 24, 2016

For Individuals:

Name:

Address:

Email Address:

Phone Number:

* * * * *

For Witnesses Representing Organizations:

Name: John Bezdek

Name of Organization(s) You are Representing at the Hearing: U.S. Department of the Interior

Business Address: 1849 C Street, NW Washington, DC 20240

Business Email Address: www.doi.gov/feedback

Business Phone Number: 202-208-6997

* * * * *

For Nongovernment Witnesses ONLY:

1. Please attach/include current curriculum vitae or resume.
2. Please list any federal grants or contracts (including subgrants or subcontracts) related to the subject matter of the hearing that were received in the current year and previous two calendar years by you or the organization(s) you represent at this hearing, including the source and amount of each grant or contract.
3. Please list any contracts or payments originating with a foreign government related to the subject matter of the hearing that were received in the current year and previous two calendar years by you or the organization(s) you represent at this hearing, including the amount and country of origin of each contract or payment.

From: Johnny Amaral

Sent: Tuesday, May 24, 2016 5:21 AM

To: David Bernhardt; Ryan A. ' 'Smith; Denny Rehberg; Dennis Cardoza

Subject: Tom and I are seated

In the seating area by the cash registers

Best,

Johnny Amaral

From: Bernhardt, David L.
Sent: Tuesday, May 24, 2016 5:26 AM
To: Johnny Amaral
Subject: Re: Tom and I are seated

We are 10 minutes out.

David Bernhardt

> On May 24, 2016, at 8:20 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:
>
>
> In the seating area by the cash registers
>
> Best,
>
> Johnny Amaral
>
>

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From: DCardoza@foley.com
Sent: Tuesday, May 24, 2016 6:16 AM
To: Johnny Amaral
CC: David Bernhardt; Ryan A. ' 'Smith; Denny Rehberg
Subject: Re: Tom and I are seated

See yo at Costa office. Dennis

Sent from my iPhone

Please excuse any auto correct errors

> On May 24, 2016, at 8:20 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:
>
>
> In the seating area by the cash registers
>
> Best,
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> Johnny Amaral
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From: Johnny Amaral

Sent: Tuesday, May 24, 2016 2:57 PM

To: Mike Burns; Gayle Holman; Tom Birmingham; Dennis Cardoza; David Bernhardt; Denny Rehberg; 'Smith, Ryan A.'

Subject: doyle story

<http://www.fresnobee.com/news/politics-government/article79605357.html>

From: Jason Peltier

Sent: Tuesday, May 24, 2016 4:46 PM

To: Johnny Amaral; Shelley Ostrowski; Dennis Cardoza; David Bernhardt

Subject: Doyle

<http://www.centredaily.com/news/politics-government/article79605357.html>

From: Johnny Amaral
Sent: Wednesday, May 25, 2016 5:58 AM
To: David Bernhardt; Ryan A. ' 'Smith
Subject: Schedule

Tom has to meet with Bezdek at 11 in the Hart building. We need to move Betsy Cody to tomorrow either before or after Cantwell.

Best,

Johnny Amaral

From: Smith, Ryan A.
Sent: Wednesday, May 25, 2016 5:59 AM
To: Johnny Amaral
CC: Bernhardt, David L.
Subject: Re: Schedule

Ok, I will reschedule.

Sent from my iPhone

> On May 25, 2016, at 8:58 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:
>
>
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> Best,
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> Johnny Amaral
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From: Lowe, Molly
Sent: Wednesday, May 25, 2016 7:36 AM
To: Johnny Amaral
CC: Foley, Ian
Subject: RE: meeting request

Hi Johnny,

Just wanted to give you a heads up that it looks like votes may be called between 1:15 and 1:45. We are hoping that they are called on the earlier end so that your 2 p.m. meeting is not affected, but we won't have specific timing for a few hours yet.

I will let you know as soon as I hear anything.

Thanks!

Molly Lowe
Office of Congressman Ken Calvert (CA-42)
2205 Rayburn HOB
(202) 225 - 1986

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Wednesday, May 18, 2016 1:55 PM
To: Lowe, Molly
Subject: RE: meeting request

2 pm on Wednesday works for us. Thanks!

My cell number is 559- [REDACTED] - [REDACTED]

Attendees will be:

Tom Birmingham
Johnny Amaral
David Bernhardt – Our DC lobbyist

From: Lowe, Molly [mailto:Molly.Lowe@mail.house.gov]
Sent: Tuesday, May 17, 2016 10:57 AM
To: 'Johnny Amaral'
Subject: RE: meeting request

Hi Johnny,

Would 2 p.m. on 5/25 work? If so, can you send me a list of attendees and the day of contact phone number?

Thanks!

Molly Lowe
Office of Congressman Ken Calvert (CA-42)
2205 Rayburn HOB
(202) 225 - 1986

From: Foley, Ian
Sent: Tuesday, May 17, 2016 1:56 PM
To: 'Johnny Amaral'
Cc: Lowe, Molly
Subject: RE: meeting request

Hey Johnny,

Molly will get the meeting scheduled. See you next week.

Best,
Ian

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Monday, May 16, 2016 4:08 PM
To: Foley, Ian
Subject: meeting request

Ian,

Tom Birmingham and I will be in DC next week on business and wanted to get together with you and Ken. Does he have any time Tuesday (24th) afternoon, Wednesday (25th), or Thursday (26th) morning?

Johnny Amaral
Deputy General Manager – External Affairs
Westlands Water District

From: Johnny Amaral
Sent: Wednesday, May 25, 2016 7:46 AM
To: Lowe, Molly
CC: Foley, Ian
Subject: Re: meeting request

Ok. Thanks for the heads up

Best,

Johnny Amaral

On May 25, 2016, at 10:35 AM, Lowe, Molly <Molly.Lowe@mail.house.gov> wrote:

Hi Johnny,

Just wanted to give you a heads up that it looks like votes may be called between 1:15 and 1:45. We are hoping that they are called on the earlier end so that your 2 p.m. meeting is not affected, but we won't have specific timing for a few hours yet.

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Johnny Amaral
Deputy General Manager – External Affairs
Westlands Water District

From: Lowe, Molly
Sent: Wednesday, May 25, 2016 10:44 AM
To: Johnny Amaral
CC: Foley, Ian
Subject: RE: meeting request

Johnny,

Votes were called early, but still may ebb in to your meeting. Ian will meet with you guys until Ken gets back.

Thanks!

Molly Lowe
Office of Congressman Ken Calvert (CA-42)
2205 Rayburn HOB
(202) 225 - 1986

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Wednesday, May 25, 2016 10:46 AM
To: Lowe, Molly
Cc: Foley, Ian
Subject: Re: meeting request

Ok. Thanks for the heads up

Best,

Johnny Amaral

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(202) 225 - 1986

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Sent: Wednesday, May 18, 2016 1:55 PM
To: Lowe, Molly
Subject: RE: meeting request

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My cell number is 559-■■■■-■■■■

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David Bernhardt – Our DC lobbyist

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2205 Rayburn HOB
(202) 225 - 1986

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Cc: Lowe, Molly
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Ian

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To: Foley, Ian
Subject: meeting request

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Johnny Amaral
Deputy General Manager – External Affairs
Westlands Water District

From: Bernhardt, David L.

Sent: Tuesday, May 31, 2016 3:38 AM

To: Johnny Amaral

Subject: Fight over California drought heats up in Congress | TheHill

FYI

<http://www.thehill.com/policy/energy-environment/281581-fight-over-california-drought-heats-up-in-congress>

David Bernhardt

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From: denny rehberg

Sent: Friday, June 3, 2016 7:02 AM

To: Amaral Johnny; Bernhardt David Longly; Cardoza Dennis; Karen Catherine

Subject: Farmers: Trump best hope for more water | Local | hanfordsentinel.com

http://hanfordsentinel.com/news/local/farmers-trump-best-hope-for-more-water/article_b3684465-a0fc-5ab2-87a5-281b10f8ef49.html

The Hon. Denny Rehberg
(US Congressman 2001-2013)
Co-Chairman Mercury LLC
Cell 202-■■■■-■■■■

From: Jason Peltier

Sent: Sunday, June 5, 2016 6:55 AM

To: Ara Azhderian; Johnny Amaral; Dennis Cardoza; David Bernhardt

Subject: Hillary Clinton steers clear of water controversy in Fresno | The Sacramento Bee

<http://www.sacbee.com/news/politics-government/capitol-alert/article81890442.html>

From: Johnny Amaral

Sent: Thursday, June 9, 2016 4:06 PM

To: Tom Birmingham; David Bernhardt; Dennis Cardoza; Denny Rehberg; Ryan A. 'Smith; Ed Manning; Carolyn Jensen

Subject: Fwd: Rep. Costa Calls on the Administration to Reexamine Harmful Actions

Best,

Johnny Amaral

Begin forwarded message:

From: "Petersen, Scott" <Scott.Petersen@mail.house.gov>

Date: June 9, 2016 at 3:52:34 PM PDT

To: "Petersen, Scott" <Scott.Petersen@mail.house.gov>

Cc: "Wainwright, Matt" <Matt.Wainwright@mail.house.gov>, "Chahil, Gary" <Gary.Chahil@mail.house.gov>, "Lopez, Juan" <Juan.Lopez@mail.house.gov>

Subject: FW: Rep. Costa Calls on the Administration to Reexamine Harmful Actions

Good afternoon,

Rep. Costa wanted to ensure that you were aware of the letter and statement he sent to Interior Secretary Jewell and Commerce Secretary Commerce today noting his opposition to the actions proposed by NOAA Fisheries and the US Fish and Wildlife Service and their respective serious impacts to California's water supply. Know that we are pursuing every available avenue to ensure that common sense prevails and the allocations are held.

If you have any questions or need any additional information, please contact me at 202-[REDACTED]-[REDACTED]

Best, Scott

J. Scott Petersen, P.E.

Deputy Chief of Staff

Rep. Jim Costa (CA-16)

From: Solberg, Kristina

Sent: Thursday, June 09, 2016 6:14 PM

To: Solberg, Kristina

Subject: Rep. Costa Calls on the Administration to Reexamine Harmful Actions



FROM THE OFFICE OF CONGRESSMAN
JIM COSTA

Representing California's 16th District
Fresno County · Merced County · Madera County

FOR IMMEDIATE RELEASE
June 9, 2016

CONTACT: Kristina Solberg
202-222-8569

Rep. Costa Calls on the Administration to Reexamine Harmful Actions

Washington, DC - Today, Rep. Jim Costa (CA-16) and fifteen members of the California House delegation sent a letter to U.S. Department of Interior Secretary Sally Jewell and U.S. Department of Commerce Secretary Penny Pritzker regarding proposed actions by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) that, if implemented, will significantly reduce the water supply available to Californians. The letter can be viewed [here](#).

In reference to the letter, Rep. Costa released the following statement:

“After four years of drought and two years of zero water allocations for many farms and communities served by the Central Valley Project (CVP), 2016 El Nino conditions created an opportunity for recovery for businesses and small communities on the brink of devastation. Today, Shasta Reservoir and Folsom Lake, the CVP’s two major reservoirs in the Sacramento River watershed, both enjoy above average storage, and there is sufficient water for the Bureau of Reclamation to meet the commitment made earlier this year to supply 100 percent water allocations to farmers in the Sacramento Valley, the San Joaquin River Exchange Contractors, and wildlife refuges in the San Joaquin Valley. However, the United States National Marine Fisheries Service (NMFS) and Fish and Wildlife Service (FWS) are now proposing new efforts to recover species, impacting CVP operations and putting at risk Reclamation’s ability to deliver water previously allocated.

“Despite an abundance of water in Shasta Reservoir, NMFS is considering a temperature control plan that would permit releases of only 8,000 cubic feet per second (cfs) of water. This constraint, which is not required by any existing regulation, would prevent farmers in the Sacramento Valley from diverting water already promised by Reclamation and would limit Reclamation’s ability to export water to meet its commitment to the Exchange Contractors, senior water rights holders in the San Joaquin Valley. It is unimaginable, but this could lead to Reclamation having to make releases from Friant Dam and reduce water previously promised to farmers in the Friant system, who for the last two years received a zero allocation. The new restriction proposed by NMFS would also make it unlikely that Reclamation could supply the meager 5 percent allocation made for south-of-Delta agricultural water service contractors. Such conservative releases during the summer months will almost certainly require Reclamation to once again drain the reserves in Folsom Dam. These consequences are unacceptable.

“While NMFS is proposing water be held in in Shasta through the summer and fall, FWS is requesting additional outflow during the summer for the purpose of increasing habitat for Delta smelt. In an attempt to address the continued decline of smelt, while remaining focused on flows instead of the comprehensive approach that is required to recover the species, the FWS is placing additional stress on a broken water delivery system. This request is outside of the requirements of the 2008 Biological Opinion, and FWS has failed to conduct the required statutory analysis or identify any statutory authority under which the request is made. Further, the outflow request was made without adequate, scientific support or environmental review. Rather than collecting and analyzing data to make an informed, scientific decision that deals with the many factors influencing the decline of the delta smelt, FWS is requesting an action be taken that has an uncertain scientific basis and could, in fact, further imperil the recovery of smelt by creating better conditions for competing species.

“To add further complexities to the requests, the two requests are seemingly incompatible. The two resource agencies, which both have responsibility to implement the Endangered Species Act, are considering actions that are seemingly contradictory and would have incredibly serious impacts to the communities that rely on the water supplied by the CVP and SWP. In order to meet both of these actions, Reclamation and the California Department of Water Resources would have to reallocate water previously promised to communities from the Sacramento Valley to Los Angeles. These communities need this water in order to aid in the recovery from a multi-year drought.

“These proposals would take away water not only from farms and communities, but from areas where CVP water is used to enhance the environment. In 2014 and 2015, Reclamation was unable to meet its legal obligation to make specified quantities of water to managed wetlands, where water is used to provide habitat for waterfowl and other species, including other endangered species like the giant garter snake. The single species management approach employed by NMFS and FWS ignores not only human needs for water, but the needs of other species that have equal protection under the law. It simply makes no common sense.

“These requests are unprecedented and the impacts, intended or not, will be severe throughout California. Until NMFS and FWS can develop a recovery plan that demonstrates these actions will provide quantifiable benefits to the species they are seeking to protect and have demonstrated that other actions that do not reduce water supply for people and the environment cannot produce comparable protections for the targeted species, these actions should not proceed. The most severely impacted by the rigid operations we have witnessed this year and by these actions are the small farming communities in the San Joaquin Valley, many of whom are suffering already from not only decreased water supply, but the rising costs associated with the delivery of scarce water.

“FWS and NMFS must start making operational decisions based on the best available science, decisions that properly consider impacts on other endangered species and communities in the Central Valley and are ultimately consistent with the intended purpose of the Central Valley and State Water Projects.”

###

Kristina Solberg
Press Secretary
Office of Congressman Jim Costa (CA-16)
1314 Longworth House Office Building
Washington, DC 20515
(P) 202.225.3341 |(F) 202.225-9308

From: Karen, Catherine
Sent: Friday, June 10, 2016 7:42 AM
To: Johnny Amaral; Tom Birmingham
CC: Denny Rehberg; Dennis Cardoza; Bernhardt, David L.; Smith, Ryan A.
Subject: Energy bill House Conferees

The Republican conferees are:

Energy and Commerce Committee

Chairman Fred Upton [R-MI]
Rep. Joe Barton [R-TX]
Rep. Ed Whitfield [R-KY]
Rep. John Shimkus [R-IL]
Rep. Robert Latta [R-OH]
Rep. Cathy McMorris Rodgers [R-WA]
Rep. Pete Olson [R-TX]
Rep. David McKinley [R-WV]
Rep. Mike Pompeo [R-KS]
Rep. Morgan Griffith [R-VA]
Rep. Bill Johnson [R-OH]
Rep. Bill Flores [R-TX]
Rep. Markwayne Mullin [R-OK]

Natural Resources Committee

Chairman Rob Bishop [R-UT]
Rep. Don Young [R-AK]
Rep. Cynthia Lummis [R-WY]
Rep. Jeff Dunham [R-CA]
Rep. Bruce Westerman [R-AR]

Science, Space and Technology Committee

Chairman Lamar Smith [R-TX]
Rep. Randy Weber [R-TX]

Agriculture Committee

Chairman Mike Conway [R-TX]
Rep. Glenn Thompson [R-PA]

Transportation and Infrastructure Committee

Rep. Cresent Hardy [R-NV]
Rep. Lee Zeldin [R-NY]

The Democrat conferees are:

Rep. Frank Pallone [D-NJ], Ranking Member Energy and Commerce
Rep. Raul Grijalva [D-AZ], Ranking Member Natural Resources
Rep. Collin Peterson [D-MN], Ranking Member Agriculture
Rep. Eddie Bernice Johnson, [D-TX], Ranking Member Science, Space and Technology
Rep. Peter DeFazio [D-OR], Ranking Member Transportation and Infrastructure
Rep. Bobby Rush [D-IL]

Rep. Lois Capps [D-CA]
Rep. Doris Matsui [D-CA]
Rep. Kathy Castor [D-FL]
Rep. Dave Loebsack [D-IA]
Rep. John Sarbanes [D-MD]
Rep. Peter Welch [D-VT]
Rep. Ben Ray Lujan [D-NM]
Rep. Paul Tonko [D-NY]
Rep. Jared Huffman [D-CA]
Rep. Debbie Dingell [D-MI]

CATHERINE KAREN
Counsel

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immediately.

From: Bernhardt, David L.
Sent: Friday, June 10, 2016 7:45 AM
To: Johnny Amaral
Subject: R House conferees

The Republican conferees for this legislation are:

Energy and Commerce Committee

Chairman Fred Upton (R-MI)
Rep. Joe Barton (R-TX)
Rep. Ed Whitfield (R-KY)
Rep. John Shimkus (R-IL)
Rep. Robert Latta (R-OH)
Rep. Cathy McMorris Rodgers (R-WA)
Rep. Pete Olson (R-TX)
Rep. David McKinley (R-WV)
Rep. Mike Pompeo (R-KS)
Rep. Morgan Griffith (R-VA)
Rep. Bill Johnson (R-OH)
Rep. Bill Flores (R-TX)
Rep. Markwayne Mullin (R-OK)

Natural Resources Committee

Chairman Rob Bishop (R-UT)
Rep. Don Young (R-AK)
Rep. Cynthia Lummis (R-WY)
Rep. Jeff Denham (R-CA)
Rep. Bruce Westerman (R-AR)

Science, Space, and Technology Committee

Chairman Lamar Smith (R-TX)
Rep. Randy Weber (R-TX)

Agriculture Committee

Chairman Mike Conaway (R-TX)
Rep. Glenn Thompson (R-PA)

Transportation and Infrastructure Committee

Rep. Crescent Hardy (R-NV)

Rep. Lee Zeldin (R-NY)

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From: Johnny Amaral

Sent: Monday, June 13, 2016 10:32 AM

To: Ryan A. ' 'Smith; Denny Rehberg; Dennis Cardoza; David Bernhardt; Catherine Karen

Subject: Sorry I got off the phone so abruptly

Things have been a little nutty out here since Thursday.

Please call or email me if you have any questions, or if there's anything I need to know for this week

Best,

Johnny Amaral

From: Bernhardt, David L.
Sent: Thursday, June 16, 2016 4:28 PM
To: Johnny Amaral
Subject: Meeting

Any word yet?



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From: Johnny Amaral
Sent: Thursday, June 16, 2016 4:31 PM
To: 'Bernhardt, David L.'
Subject: RE: Meeting

They just finished the first item, which was a refresher on the origins of the loan, timeline, terms, etc. Next item is to discuss the big one

-----Original Message-----

From: Bernhardt, David L. [<mailto:DBernhardt@BHFS.com>]
Sent: Thursday, June 16, 2016 4:28 PM
To: Johnny Amaral <jamaral@westlandswater.org>
Subject: Meeting

Any word yet?

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From: Johnny Amaral
Sent: Thursday, June 16, 2016 5:39 PM
To: 'Bernhardt, David L.'
Subject: RE: Meeting

All staff and lawyers were booted out of the meeting about 45 minutes ago

-----Original Message-----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Thursday, June 16, 2016 4:31 PM
To: 'Bernhardt, David L.' <DBernhardt@BHFS.com>
Subject: RE: Meeting

They just finished the first item, which was a refresher on the origins of the loan, timeline, terms, etc. Next item is to discuss the big one

-----Original Message-----

From: Bernhardt, David L. [<mailto:DBernhardt@BHFS.com>]
Sent: Thursday, June 16, 2016 4:28 PM
To: Johnny Amaral <jamaral@westlandswater.org>
Subject: Meeting

Any word yet?

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From: Bernhardt, David L.
Sent: Thursday, June 16, 2016 6:34 PM
To: Johnny Amaral
Subject: Re: Meeting

Thanks for the update.

[REDACTED]

> On Jun 16, 2016, at 8:38 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>
> All staff and lawyers were booted out of the meeting about 45 minutes ago

>
> -----Original Message-----

> From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]

> Sent: Thursday, June 16, 2016 4:31 PM

> To: 'Bernhardt, David L.' <DBernhardt@BHFS.com>

> Subject: RE: Meeting

>
> They just finished the first item, which was a refresher on the origins of the loan, timeline, terms, etc. Next item is to discuss the big one

>
> -----Original Message-----

> From: Bernhardt, David L. [<mailto:DBernhardt@BHFS.com>]

> Sent: Thursday, June 16, 2016 4:28 PM

> To: Johnny Amaral <jamaral@westlandswater.org>

> Subject: Meeting

>
> Any word yet?

>
> [REDACTED]

>
>
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>

From: Johnny Amaral

Sent: Monday, June 20, 2016 8:20 AM

To: Ryan A. ' 'Smith; Mike Burns; Ed Manning; Denny Rehberg; Dennis Cardoza; David Bernhardt; Catherine Karen; Carolyn Jensen

Subject: No calls today...

Sorry for the short notice but I'm tied up this morning until 11 AM. Please email me or call me if you have any questions or anything I need to know going into this week, specifically tomorrow's board meeting

Best,

Johnny Amaral

From: Johnny Amaral

Sent: Tuesday, June 21, 2016 6:54 PM

To: Ryan A. 'Smith; Mike Burns; Ed Manning; Denny Rehberg; Dennis Cardoza; David Bernhardt; Catherine Karen; Carolyn Jensen

Subject: Fwd: Memorandum to Westlands Landowners and Water Users

FYI

Best,

Johnny Amaral

Begin forwarded message:


From: "Gayle Holman, Public Affairs Rep" <gholman@westlandswater.org>

Date: June 21, 2016 at 6:34:43 PM PDT

To: jamaral@westlandswater.org

Subject: Memorandum to Westlands Landowners and Water Users

Reply-To: gholman@westlandswater.org

	
Westlands Water District	
3130 N. Fresno Street, P.O. Box 6056, Fresno, California 93703-6056, (559) 224-1523, FAX (559) 241-6277	
MEMORANDUM	
TO:	Westlands Water District Landowners and Water Users
FROM:	Thomas W. Birmingham, General Manager/General Counsel
SUBJECT:	Loan to Jason Peltier
DATE:	June 21, 2016

On June 9, 2016, there appeared in several newspapers an article by the Associated Press concerning a loan made by Westlands Water District to Jason Peltier, the District's former Chief Deputy General Manager. The information contained in the article drew in part from documents Westlands Water District provided to an Associated Press reporter pursuant to a Public Records Act request. Since the publication of that article, numerous questions have been asked of the District by landowners, water users and the public about the loan. I write to provide you with background on the loan.

Mr. Peltier became the Chief Deputy General Manager of the District in June 2007, after previously serving as a Deputy Assistant Secretary for Water and Science in the United States Department of the Interior. Before accepting employment with Westlands, Mr. Peltier and his spouse had signed an agreement to purchase a home in Walnut Grove, California. To facilitate the Peltiers' purchase of that home, and because the sale of their home in Virginia had not been completed, on July 16, 2007, the District Board of Directors approved a bridge loan for the Peltiers in the amount of \$1.4 million. The source of money for that loan was a District cash reserve. The initial rate of interest on the bridge loan to the Peltiers was 5.5% per annum, compounded each 90 days while any principal remained outstanding, and the loan was due upon the sale of the Peltiers' home in Virginia or on July 27, 2008, whichever was earlier. The Peltier loan was secured by a first deed of trust the District recorded on the home purchased by the Peltiers in Walnut Grove, California.

By July 2008, the Peltiers had not sold their home in Virginia, and the due date on the loan was extended to January 27, 2009. The other terms of the loan remained unchanged. In January 2009, the due date on the loan was again extended to October 29, 2009, and the interest rate was reduced from 5.5% to 4.5%. Prior to the 2012 loan modification, which reduced the interest rate on the Peltiers' loan to .84%, there were additional loan extensions with the interest rate remaining at 4.5%. Beginning in December 2009, the Peltiers began making monthly interest payments in the amount of \$5,893.

In May of 2012, the Peltiers advised that they had received an offer to purchase their Virginia property. At the time, they proposed to the District that the 2007 note be forgiven in exchange for the District accepting the net proceeds on the sale of the Virginia property, which they estimated at approximately \$315,000, and the proceeds on a new loan they would take out on their California home, approximately \$680,000, for a total of approximately \$1,000,000. This figure was significantly less than what was owed the District, and the District rejected this proposal. The District did agree, however, to negotiate a modification of the loan terms.

The terms of the 2012 Loan Modification Agreement extended the loan for an additional nine years with monthly principal and interest payments, calculated of a 30 year amortization period. The promissory note shall now be paid in full on or before August 31, 2021. The terms included an interest rate of .84% on the principal and accrued interest. This note is secured by a deed of trust recorded on the Peltiers' Walnut Grove property.

Media reports about the Peltier loans have emphasized the .84% interest rate that was part of the 2012 Loan Modification. It bears noting that the total interest paid to the District over the period of the loan (2007-2021) will include interest that accrued at 5.5% and 4.5% during the first two years of the loan and will include interest paid at 4.5% from November 2009 through September 2012. If the Peltiers repay the Westlands loan according to the terms of the loan modification signed in 2012, for the period of the loan, from July 2007 through August 2021, they will pay the District in excess of \$450,000 in interest. This is comparable to a 15 year note at approximately 3.5% interest or a 30 year note, repaid at the end of the 14th year, at approximately 2.8% interest.

Westlands Water District, 3130 N. Fresno Street, P.O. Box 6056, Fresno, CA 93703-6056

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From: Johnny Amaral

Sent: Thursday, June 30, 2016 1:23 PM

To: Ryan A. ' 'Smith; Denny Rehberg; Dennis Cardoza; David Bernhardt; Catherine Karen

Subject: Friday am calls

In accordance with our policy, and as a reminder, the 10 AM Eastern call is canceled for this week since Tom canceled the 10:30 AM Eastern call.

Have a safe and happy 4th of July

Best,

Johnny Amaral

From: DCardoza@foley.com

Sent: Wednesday, July 6, 2016 6:46 PM

To: tbirmingham@westlandswater.org; Peltier Jason; Amaral Johnny; Gilmore Rick; Azhderian Ara; Rubin Jon D.; JWalsh@foley.com; Bernhardt David Longly; Karen Catherine; dennymontana@dennyrehberg.com

Subject: McConnell's office

Hi all,

As you know Denham's predation bill got off the House floor on a voice vote yesterday. I spoke with Neil in McConnell's office today and he didn't think there would be "room" to get it off the floor.... Didn't know how it would fit into the schedule,...

I was visiting him on another issue but wanted to share.think we should all discuss this further.

Regards,

Dennis

Sent from my iPhone

Please excuse any auto correct errors

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From: DCardoza@foley.com

Sent: Monday, July 11, 2016 10:38 AM

To: 'Johnny Amaral'

CC: David Longly Bernhardt (dbernhardt@bhfs.com); 'Karen, Catherine'; 'Rhebergen, Deborah N.'

Subject: Sorry to have missed the call

Attachments: 160707 - FINAL - Azhderian June 12 Testimony.pdf

Hi all, I had a partners meeting of the firm that ran over and when I called you were gone.... Please let me know if there is anything I missed. Ara is here and we are doing prep for the hearing he is participating in tomorrow. I am attaching his testimony and I recommend reviewing as it is very informative re: smelt biop and operational details.

Regards,

Dennis

Congressman Dennis A. Cardoza Ret

Foley & Lardner LLP

Suite 600

3000 K Street, NW

Washington, DC 20007-5109

Phone: 202.295-4015

Cell: [REDACTED]

Fax: 202.672.5399

Email: dcardoza@foley.com

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Ara Azhderian
Water Policy Administrator
San Luis & Delta-Mendota Water Authority

Testimony
Before the Subcommittee on Water, Power, and Oceans
Committee on Natural Resources
United States House of Representatives

"Changing Demands and Water Supply Uncertainty in California."
July 12, 2016

INTRODUCTION

Mr. Chairman, Ranking Member Huffman and Members of the Subcommittee, my name is Ara Azhderian, Water Policy Administrator for the San Luis & Delta-Mendota Water Authority (Authority). Thank you for the opportunity to appear before you today to testify on the causes of uncertainty affecting the water supply of the 8th largest economy in the world, the State of California.

The San Luis & Delta-Mendota Water Authority (Authority) is a Joint Powers Authority under California law that was formed in 1992. The Authority serves 29 member agencies, 27 of which hold contracts for water with the United States Department of Interior Bureau of Reclamation's (Reclamation) Central Valley Project (CVP). Our members manage water to serve agricultural, municipal, and environmental purposes. Our service area is approximately 3,300 square miles and spans all or parts of 8 counties: Contra Costa, Santa Clara, San Joaquin, Stanislaus, Merced, San Benito, Fresno, and Kings. Roughly, our northern border is the southern edge of the Sacramento-San Joaquin Rivers Delta (Delta), our eastern border is the San Joaquin River, our southern border is California State Highway 41, and our western border is the Santa Cruz Mountains. Our members provide water to 5 of the nation's top 10 agricultural producing counties, to the second largest contiguous wetlands in the United States after the Florida Everglades, and to approximately 2 million Californians living in communities ranging from small, rural, often disadvantaged towns like Avenal and Huron, to the affluent global center of technology, Silicon Valley. If you have eaten a cantaloupe, used a can of tomato sauce or jar of salsa, "googled" on an iPhone, or just appreciate the majesty of birds migrating the Pacific Flyway, the chances are good that you've been touched by CVP water.

BACKGROUND

Since formation of the Authority, drought has been the center of our universe. In 1992, California was in the 5th year of a natural drought, a hydrologic situation not dissimilar from today. In the worst of it, CVP agricultural water service (Ag Service) contractors were allocated 25% of their contract supply. Concurrently with the natural drought, regulatory changes were happening in rapid succession, first with the listings of winter-run salmon and delta smelt under the federal Endangered Species Act, the reprioritization of CVP water supplies under the Central Valley Project Improvement Act, and new water quality standards under California's delegated Clean Water Act authority. The water supply reductions resultant of the natural drought made it difficult to comprehend what the water supply impacts of the regulatory drought would be once the rains returned. As the dust settled over the next few years, it became clear that the regulatory drought had reduced the CVP water supply for south of Delta Ag Service contractors by about 35% on average. Many small farms vanished, many acres were constantly fallowed, many jobs were lost, and several once vibrant agricultural communities became shells of their former selves.

In response, farmers did what they do best, adapt. The new regulatory water supply gap would be expensive to close, so farmers started planting higher value crops. With the increased revenue, they began investing in state-of-the-art irrigation systems, reusing and recycling drain water, and purchasing water for transfer, a big portion of which came from northern California. By the late 1990's, as some stability returned, efforts turned towards restoring the water supply lost to the regulatory drought. The center of this effort was known as CALFED, an enterprise aimed at improving both the environment and

water supply. However, despite billions of dollars spent and millions of acre-feet dedicated to the cause, by the mid 2000's new, startling fish abundance declines were underway, affecting delta smelt and winter-run salmon, among others. With respect to delta smelt, the Interagency Ecological Program Pelagic Organism Decline Progress Report: 2007 Synthesis of Results identified numerous possible causes for the decline, including contaminants, predation, and lack of food, and stated, "Entrainment at the CVP and SWP pumps also seems to be an unlikely single cause of POD but may be important in some years for some species." Regarding salmon, both the National Marine Fisheries Service (NMFS) and Pacific Fishery Management Council concluded that the sudden decline was caused by poor ocean conditions. PFMC stated in their March 2009 report "What caused the Sacramento River fall Chinook stock collapse?" that "The evidence pointed to ocean conditions as the proximate cause because conditions in freshwater were not unusual, and a measure of abundance at the entrance to the [Bay-Delta] estuary showed that, up until that point, these broods were at or near normal levels of abundance." Yet, despite numerous scientific reports identifying multiple causes driving the new fish declines, the United States Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) chose to do what they have always done, implement single stressor, single species regulations, primarily on the CVP and California State Water Project (SWP) (collectively Projects), while doing little to address the myriad of other known stressors.

In 2008 and 2009, the FWS and NMFS issued new biological opinions (BiOp), the primary focus of which is to curtail pumping. While the BiOps do call for other actions, like habitat restoration, no action has been as vigorously implemented as the pumping constraints. Like the regulations implemented in the early 1990's, these too were implemented during a natural drought period so the "real world" water supply costs have been difficult to determine. Water operations modeling suggests that the BiOps have cut CVP and SWP water supplies by about another 30 percentage points. For south of Delta Ag Service contractors, this translates to a long-term average water supply of about 35% of contract. The current BiOps have squeezed virtually all of the operational flexibility from the Projects, causing the damaging effects of the natural drought to amplify the chronic water supply shortages of the regulatory drought, with devastating effect throughout the CVP service area, but especially in the San Joaquin Valley. Over the last 4 years, CVP south of Delta Ag Service water supply allocations have been 20%, 0%, 0%, and 5%. In 2014, for the first time in the history of the CVP, Reclamation had to draw CVP water from the Eastside of the San Joaquin Valley for delivery to the Westside, and to borrow water from individual farmers and districts, because it could not meet its contractual and statutory obligations to provide water to prior water rights holders and managed wetlands from traditional sources of supply in the north. In addition, over 2 million acres of farmland received no CVP water whatsoever and CVP supplies to municipalities were approximately 30% of historical average, significantly lower than the minimum called for in Reclamation's Municipal & Industrial Shortage Policy. These disasters were repeated in 2015.

Since imposition of the BiOps, federal agencies have steadfastly claimed that the unprecedented water supply shortages that have followed have been the result of the natural drought, not a regulatory drought. As recently as February 24 before this very Subcommittee, Reclamation's Mid-Pacific Region's Director David Murillo reiterated, "While some have argued the state's water supply cutbacks are entirely due to environmental regulations, *it has been drought – the extreme declines in annual precipitation and snowpack in California since 2012 – far more than any other factor* [emphasis added], that has constrained the ability of the state and federal projects to deliver full allocations of water

during these years.” Clearly natural drought plays a role in water supply, this has always been the case and is a major reason why the Projects were built, but a review of the volume of water stored in Shasta Reservoir [Attachment 1] clearly demonstrates that it is how the water is used that affects water supply allocations, much more than how much there is of it. The red line represents 1977, the benchmark dry year, the blue line represents 1991, the fourth year of that 5 year drought cycle, the green line represents 2015, the fourth year of our most recent drought cycle, and the heavy blue line represents this year. The corresponding CVP south of Delta Ag Service water supply allocations for these 4 example years are 25%, 25%, 0%, and 5%. And it is not just the volume of water in storage that has been affected, but too our ability to capture water at critical times. Attachment 2 illustrates all of the missed opportunities this year to pump water when it was abundant in the Delta. The color coded background indicates what regulation was generally causing the restriction over some period of time. The dashed, variable line indicates the volume of uncontrollable water flowing through the Delta and into the Pacific Ocean. The comparatively static, solid line indicates combined CVP and SWP pumping. The effect of the BiOps pumping restrictions are plain to see – the ability to pump water south is now essentially divorced from the volume of water available in the north. The result of this disconnect is illustrated in Attachment 3. The blue bars compare the volume of water that flowed into the Pacific in 2015 and 2016. The red bars compare the volume of water pumped in the same timeframe. Despite there being 350% more water flowing through the Delta this year, the Projects were allowed to only capture 50% more than last year. It is undeniable that regulation is the significant driver behind chronic water supply shortages; natural drought just exacerbates the already bad situation.

By any measure, 2016 will be a historic year, and likely turning point, for the Projects. For 4 years now we, all of us, have been told that when the rains return to California, so will the water. But that has not happened. Looking forward, it seems unlikely that the decades-long decline in delta smelt and winter-run salmon populations will suddenly, dramatically, and sustainably reverse absent new management approaches. If that is so, what are the implications for California, the 8th largest economy in the world and producer of about 50% of the nation’s fruits, nuts, and vegetables? What are the implications to the financial investment Congress and other have made in the CVP? And what are the implications to the cultural, socio-economic, and environmental conditions of the people once encouraged to settle and develop communities in the Central Valley, a population roughly the size of the State of Colorado?

We are at a critical juncture. Our agricultural and municipal water users have continually adapted to the ever increasing regulatory demands, becoming among the most efficient users of water in the world. However, continued gains through conservation, reuse, and recycling are not limitless, are extremely costly, and in some cases economically infeasible. The myopic attention on flows over the past quarter century have contributed mightily to the terrible status of several species today. Regulators have too readily seized upon flows in part because it is an easy, tangible, “feel good” change to make. And while virtually every drop of water used for agricultural and municipal purposes must be accounted for, the fastest growing segment of water demand, environmental management, has no such requirement for accountability. Moreover, the prevalent single stressor, single species approach imposed by FWS and NMFS ignores the consistent and pervasive scientific advice that multiple stressors are work therefore comprehensive solutions are necessary if we are to be successful. As an example, habitat restoration has long been identified as an important part of the solution, but progress has been inexcusably slow given the decades listed fish populations have been under stress. Ultimately, better

solutions will require better approaches, science, and decision making processes to ensure that we are not the first generation of resource managers that leave both environmental and water supply conditions worse for the next generation. The time is now, the choice is ours and, for many of us, the choice is obvious.

WATER SUPPLY UNCERTAINTY DUE TO DELTA SMELT MANAGEMENT

POPULATION

Delta smelt population indices are at an all-time low, which is a natural cause for concern and the primary driver of fears regarding the potential for extinction. However, while the population indices do tell us about the general trend in delta smelt abundance, they do not provide us an accurate estimate of actual population. There are several reasons for this. First, the monitoring methods used to measure delta smelt numbers and distribution are inefficient. A boat can trawl the open water looking for delta smelt and catch a few or none while feet away, individuals sampling the shore with nets can catch tens, even hundreds, at essentially the same location. Also, delta smelt are known to reside in regions, such as Cache Slough and the Sacramento Ship Channel, that are not counted in the historical population indices or recent FWS population estimates. In other words, the numbers reflected by both are known to be artificially low. Further, these regions not only routinely harbor significant numbers of delta smelt but, such as with Cache Slough, also some of the healthiest. While for years there has been broad agreement that the current monitoring practices are inefficient and in need of modernization, change has been inexcusably slow.

Extinction concerns should be further moderated by two other considerations. First, work completed earlier this year by U.C. Davis used genetics based measures to assess the effective population size of delta smelt. The findings are promising and demonstrate that the effective population size of delta smelt as of the 2014 year class is above the threshold where fitness related genetic diversity is expected to be lost. The implication of the genetic diversity and the effective population size information is that a large number of Delta Smelt remain in the San Francisco Estuary system. However, the current disparity between FWS delta smelt abundance indices and the effective population size is a concern as it may indicate existing monitoring programs will have difficulty adequately representing delta smelt abundance, distribution or habitat needs. Second, there are two delta smelt conservation hatcheries, the U.C. Davis Fish Conservation and Culture Laboratory (FCCL) in Byron, California and the U.S. Fish and Wildlife Service's Livingston Stone National Fish Hatchery located at the base of Shasta Dam near Shasta Lake City, California. These facilities exist to raise delta smelt as a back-up or "refuge" population to insure against extinction. These delta smelt also represent an untapped resource, as they could be used to conduct field research to improve our very limited understanding of suitable delta smelt habitat and/or as brood stock to assist in the recovery of the wild population. Unfortunately, current FWS policy prohibits use of these fish beyond the hatchery, so for the vast majority, they are simply reared to be discarded at the end of their one year life span. We should be able to do better with our multi-million dollar annual investment.

INCIDENTAL TAKE LEVEL AND 2016 WINTER OPERATIONS

Generally, an Incidental Take Level is the number of a listed species that a regulatory agency anticipates will be taken by the normal, permitted activity of an action agency. For 2016, the FWS calculated an ITL of 56 adult Delta smelt and 392 juveniles for the combined CVP and SWP pumping

operations, which supplies water to roughly 2 out of 3 Californians. How the ITL is both calculated and managed raises significant concerns. First, the ITL is unreasonably low. This is in part due to its reliance on the artificially low abundance index numbers. But, it is also because the most recent formula developed and implemented by FWS this year excludes a significant portion of the historical take data largely related to average water-year types. Essentially, the center of the take bell curve was ignored. What remains are the extremes, either really dry years when pumping and turbidity are low anyway, or very wet years when OMR's reverse flow is low because of high San Joaquin River inflow. Under either condition, historical take is generally low. So, by only including outlying years with historically low take, the current ITL formula produces a number much lower than what would reasonably be expected under normal pumping operations. Whether this approach was an explicit policy choice, or a de facto one resulting from choices made by those who created the formula, is unclear. What is clear is that it is not a science issue, and, if left unresolved, will continue to artificially constrain California's water supply, potentially for years to come.

The second, and perhaps more significant, concern with the ITL is its psychological effect. With the adult abundance index at an all-time low, and an all-time low ITL, the handful of biologists making day-to-day operational decisions have begun viewing the ITL as a number to avoid rather than one to be expected, as demonstrated in Smelt Working Group notes stating that 0 salvage should be considered a requisite to increased pumping. Under normal conditions, an ITL will be exceeded periodically and the process thereafter is to reconsult, which has happened with adult DS in the past. Under today's conditions, the fear of reconsultation is great, in part because the fear of extinction is overblown. When the Projects asked FWS what would happen *this* year if the ITL of 56 fish was exceeded, the answer was that OMR, and therefore pumping, would likely be constrained to the bare minimum of -1,250 cfs for the remainder of the adult spawning period, perhaps months. The apprehension that results prompts the CVP and SWP operators to take actions to not just minimize, but avoid, their otherwise lawful, permitted level of take. The resultant water supply cost due to lost pumping between January and March 2016, was approximately 820,000 acre-feet (Attachment 4) with no demonstrable benefit to delta smelt abundance. That is enough water to serve about 1.6 million households for a year, to farm approximately 270,000 acres of crops, and to produce billions dollars of economic activity. In the end, the resultant socio-economic harm is a policy choice, not a scientific question, and yet for the most part, the harmful results stem from the unchecked opinions of a few state and federal biologists.

If the purpose of a BiOp is to avoid jeopardy and adverse modification of critical habitat, what information has the FWS developed to demonstrate the operational constraints imposed upon CVP and SWP operations over the last 9 years are achieving those goals? Regrettably, there is none and, rather than that fact leading to a wholesale reevaluation of how and what is being done to protect and recover Delta smelt, the FWS is proposing a more of the same strategy. The mantra today has become every fish matters but, only if they *may* be affected by the Projects. In the meantime, the FWS continues to do little to address the multitude of other stressors that independent scientists have been telling us for decades, ignore at your own peril. Delta smelt were listed nearly 25 years ago, what has FWS done to address other stressors? What other BiOps, ITLs, permits, and restrictions has FWS imposed on activities beyond the Projects? What explains the willingness of FWS to take, in a single day, at a single location, the number of adult delta smelt equivalent to the total allowed the Projects for the entire year? The response would likely be concern about entrainment in the south Delta in general, not just salvage. But, what evidence demonstrated this was occurring? The January through March Spring

Kodiak Trawl data clearly demonstrates that the vast proportion of delta smelt were along the Sacramento River between Suisun Marsh and the Sacramento Ship Channel (Attachment 4), far to the north, consistent with historical distribution. The Smelt Working Group's biologists' response is that lack of delta smelt in the monitoring data is not evidence of their absence, and that may be, but it certainly says something about the relative proportion at risk and the disproportionate regulatory response to their protection.

Ultimately, what this years' experience demonstrates is how far we have veered from the use of best available science and the blurred distinction between science and policy choices. Multi-billion dollar decisions impacting millions of lives and numerous public policy initiatives are being made in isolation by a handful of individuals based upon conjecture and belief, not science. At what point does unbridled discretion become an abuse of authority? Or, is this the new normal for California and all that depend upon the CVP?

SUMMER FLOW ENHANCEMENT

In what can only be described as a Hail Mary, the FWS is proposing it's most desperate action yet, increasing summer outflow in the hope it may produce more delta smelt. Unfortunately, the proposal as described in various meetings – it is not yet documented – does not appear to be supported by the weight of scientific evidence. Our current understanding is that the FWS is pressing Reclamation to acquire between 80,000 and 115,000 acre-feet of water to augment Delta outflow in August and September of 2016, and between 200,000 and 300,000 acre-feet of additional outflow from July through September in 2017 and 2018. The intent is to move "X2", the location in the Delta where salinity is at 2 parts per thousand, further west in the hope that this new location will somehow benefit the population. The cost to move X2 is significant, both in terms of water and money. Recently, Reclamation identified the activities from which it would take \$10,880,000 from existing projects, including from the Battle Creek Salmon and Steelhead Restoration Project, one of the largest cold-water anadromous fish restoration efforts in North America, and refuge water supplies, which are not only an already unmet statutory obligation, but a vital resource in the protection of migratory birds protected under Migratory Bird Treaty Act of 1918 as well as management of numerous other endangered species. Furthermore, while the FWS has been clear that this proposed action is outside the bounds of the BiOp, and therefore should be a non-reimbursable cost to the CVP, Reclamation has yet to insure that the costs that may be incurred will not be rebilled to CVP contractors.

In putting forth its proposal, FWS has not only ignored the best available science but also the Administration's commitment to transparency, participation, and collaboration. The published literature indicates that Delta Smelt abundance is unrelated to summer outflow, the location of X2, or the volume of low salinity habitat. It also suggests that delta smelt would not move from one location to another because of a change in the location of X2. And if they did, published field studies demonstrate they would likely leave superior habitat like that in the Cache Slough region of the Sacramento River, where most of them are currently located, for some of the poorest quality habitat, which is in Suisun Bay. In other words, the proposed flow augmentation could actually further harm delta smelt, though none of the potential adverse effects of this discretionary action have been analyzed. It is just assumed the benefits will outweigh the consequences. Rather than risking millions of dollars on this ill-conceived idea, the biological benefit of which will likely never be measured, we should

invest in research and actions that could yield tangible results, such as understanding the biological mechanisms driving delta smelt declines.

WATER SUPPLY UNCERTAINTY DUE TO WINTER-RUN MANAGEMENT

Nine months into the water year, CVP and SWP contractors finally have a salmon temperature management plan. However, while the plan allows for operations much closer to those originally approved by NMFS on March 31, 2016, it also contains a number of conditions and off-ramps that if triggered would rapidly result in decreased releases from Shasta Reservoir and potentially severe water supply disruptions throughout the Central Valley. In early May, Reclamation and NMFS learned that Shasta Reservoir was warmer than expected, thus NMFS informed Reclamation that the March 31 concurrence was no longer supportable and the effort to formulate a new plan was initiated. Over the course of nearly two months, NMFS, the California Department of Fish and Wildlife, the State Water Resource Control Board, the California Department of Water Resources, and Reclamation worked diligently, and insularly, to produce another acceptable plan, which was finally approved on June 28, 2016. While agreement was welcomed, the process for developing the plan and disproportionate attention given to a single biological stressor is cause for great worry going forward.

Generally, the salmon life cycle has a number of important stages: the egg-to-fry stage, when they are most sensitive to temperature, the juvenile stage when they will attempt to migrate down the Sacramento River to rear in the Delta and ocean, the adult stage when they mature in the ocean for about 2 1/2 years, and finally the adult migration back home to spawn so that the cycle can begin all over again. At each step, there are a number of manageable factors that affect the survival of salmon. The Herculean temperature management planning effort focused thousands of staff hours, nearly a hundred model scenarios, and untold policy conversations to wrestle a decision about whether another nearly 400,000 acre-feet of water should be taken from water users to improve the predicted temperature related survival of winter-run salmon from 94% to 95%. All the while, relatively little was, or is, being done to address the estimated 75% predation related mortality that will occur as the juvenile salmon migrate downstream to the sea, or the near 20% harvest related mortality that will occur as a result of commercial and recreational fishing in the ocean. For the few that successfully survive the journey, other factors will affect their reproductive success, such as the quality and availability of suitable spawning gravel and habitat conditions in the river. Typically, only about 0.05% of the eggs laid in the river will survive to maturity at age 3 and successfully reproduce the next generation to complete their lifecycle. For 2016, the work done to develop the water temperature management plan predicts that temperature-related mortality for winter-run salmon to be 5 to 6%, which means over 94% of the expected mortality will be resulting from other causes.

Is temperature related survival a vital step in the salmon lifecycle? Of course, but it is not the only vital step; successful temperature management does not always translate into a high number of mature adults returning to spawn. The reality is, if we get survival at one life stage perfect, and ignore other sources of mortality, we fail. The fact that winter-run salmon stocks, along with other Central Valley salmon, have continued to decline so significantly over the past several decades is a clear and strong indicator that the current management approach of focusing disparately on only a few select stressors has not proven to be effective. So, while we should be concerned about the poor temperature related survival of the past two years, we should not be surprised by the overall low abundance of

winter-run salmon. Until we implement a comprehensive approach to their care, winter-run, along with other salmon, will continue to suffer.

While efforts are underway to establish more collaborative forums to assess the state of knowledge regarding Central Valley salmonids and to provide a basis for designing and implementing improved management actions, the pace is too slow and the level of federal effort disproportionate to the problem. Discussions among public water agencies, environmental and fisheries organizations, and state and federal agencies demonstrate a willingness and ability to collaborate on comprehensive solutions. These discussions have identified a diverse set of potential management actions, such as spawning gravel augmentation and habitat improvements, reducing predation, improving hatchery management, implementing a mark-select harvest program to reduce commercial and recreational fishing impacts to wild and listed salmon, improved methods for transporting and releasing salmon, among others. In 2014 and 2015, CVP contractors worked with Reclamation to make available a quarter billion dollars of water to augment temperature management potential. But to fully realize the potential of federal, state, and local government and private partnerships, NMFS must dedicate the resources necessary to help develop, and ultimately permit, these multi-stressor solutions.

RECOMMENDATIONS

We are upon another historic turning point in the management of listed species and the Projects. The choices made over the coming months will impact California, the nation, and beyond, probably for decades. On one hand, we can continue down the path established by the FWS and NMFS over a quarter century ago: single species, single stressor management, insular science and process void of experimentation, balance, or accountability, and failing to protect, much less recover, the species. Or, we can embark on a new path, one that is collaborative, transparent, comprehensive and far more likely to produce beneficial results for listed species and the people who both care for their protection yet depend upon the Projects' for an affordable, reliable, and sufficient water supply.

We understand that Interior and the California Department of Water Resources are currently working on a framework for furthering an array of short term actions aimed at helping smelt. This is helpful as it may bring some order to this very chaotic regulatory and operating environment. To inform this process and others needing guidance and oversight, we offer the following recommendations. It is not the aim of the San Luis & Delta-Mendota Water Authority to eliminate or undermine environmental protection. On the contrary, it is our interest to develop, implement, and support *effective* environmental protection.

NEED FOR TRANSPARENCY

On his first day in office, President Obama signed the Memorandum on Transparency and Open Government to express his Administration's commitment toward improving government openness, efficiency, and effectiveness through transparency, participation, and collaboration. Unfortunately, little of the potential of this commitment has been realized by the FWS and NMFS. The examples of concern above were born in insular processes followed by choice, not necessity. If public water agencies and the people we serve are to suffer the consequences of the regulations imposed upon them, they also deserve to know throughout the formulation process the need, scientific basis, policy tradeoffs, and anticipated outcomes of the proposed action. Sadly, this level of transparency, and the accountability that should accompany it, is not present today. This should change.

NEED FOR COLLABORATION

Despite their best efforts, the federal and state regulatory and resource agencies have not been able to adequately protect listed species nor provide sufficient water supply to millions of Californians. This reality is due to a number of factors: limited budgets, lack of resources, legal authorities, and capabilities, among them. In order to ensure better outcomes going forward, federal and state agencies should partner with public water agencies, and other entities, committed to and capable of expanding efforts to address the myriad of problems we face today. Public water agencies provide a unique, largely untapped, resource to help address the environmental and operational concerns affecting management of listed species and the Projects. Public water agencies hold a distinct position in California's water resource management chain, serving as intermediary between the federal and state agencies and as fiduciaries to the tax and rate payers that both fund and rely upon our collective services. Public water agencies also have specialized operational knowledge, modeling and scientific capabilities, a unique concern in the policies, practices, and outcomes of federal and state government actions, and extraordinary expertise and resources to bring to bear.

An example of an ongoing scientific and management oriented collaborative effort is the Collaborative Science and Adaptive Management Program, or CSAMP. It includes representatives from federal and state fish and wildlife and water supply agencies, public water agencies, and environmental organizations. While this forum was born from the litigation over the 2008 and 2009 FWS and NMFS biological opinions and was created to help address the most controversial science questions related to the BiOps in an inclusive and collaborative manner, it continues to work voluntarily today with the aim of minimizing divergent views and potential conflicts associated with the science used to inform future opinions. Over the last 3 years, the effort has identified key knowledge gaps and disagreements in our understanding of Central Valley salmonids and provided recommendations to resolve them, and has begun a series of analyses examining questions related to the impact of Project operations from entrainment and fall outflow on Delta smelt. While initial progress was slow, trust and a strong collegial work environment has emerged. Unfortunately, both recent processes to develop the FWS summer flow proposal and the NMFS reevaluation of the salmon temperature management plan chose to ignore the CSAMP collaborative approach; rather, employing the traditional insular method. Much of the controversy that exists today regarding these two proposals could have been minimized, and perhaps avoided, if a collaborative approach like CSAMP had been utilized from the outset. If the better outcomes we are all seeking are to be achieved, a better process to develop the science and management actions and evaluate their performance is necessary.

Related to collaboration is the attendant need to implement true adaptive management programs. While the BiOps talk about adaptive management, it is not effective adaptive management in that it provides no formal, structured path for ongoing stakeholder participation in the questioning and testing of hypotheses to refine or reject management actions based upon the scientific evidence. What is in place current has basically been used by the FWS and NMFS to impose stricter regulatory criteria or thresholds unilaterally, without any monitoring or assessment of the actions biological efficacy. As with investing, we should not adopt a set it and forget it approach to environmental management.

NEED TO UNDERSTAND CAUSE AND EFFECT

For decades now, numerous independent scientists and peer review panels have cautioned against too much reliance upon statistical correlations and have recommended we focus instead on

researching cause and effect relationships. Correlations can be misleading because they do not always reflect the actual cause-and-effect relationships or the underlying mechanisms. Absent causal information, it is difficult to predict how changes in an environmental variable can effect changes in the population of a species. By better understanding the biological mechanisms at work, we will develop management actions that are both more efficient and effective. Yet, despite overwhelming agreement to the contrary, the FWS yet again proposes a management action based upon a very weak statistical relationship. The current FWS proposal to augment summer Delta outflow hinges on the idea that delta smelt abundance is somehow linked to the location of X2 (the location in the Delta where salinity is at 2 ppt) in the western Delta. X2 is the posterchild of the cause and effect warning.

From its very onset in 1996, the “so-called “fish-X2” relationships”, as it used to be referred to, was recognized as being a “rather crude management tool” by the Interagency Ecological Program, which stated, “More precise influence on these species in terms of quantity or timing of outflow would be desirable for efficient management. In addition, the potential influence of alternative or complementary management actions is difficult to determine from these [statistical] relationships”. The US Geological Survey offered similar caution observing, “Significant scientific uncertainty remains, however, about the specific linkages between salinity [i.e. X2] and fish species abundance and about how the aquatic ecosystem within the Delta and Suisun Bay might respond to changes in water flow management. Information is also needed about the relationships between river flow and... the effects of contaminants both in the water, and associated with suspended and bottom sediments [i.e. causal mechanisms].” In 2006, an independent science review panel report examining the then occurring Pelagic Organism Decline remarked, “More generally, in using historical data to infer the effect of an environmental variable on a biological population, it is important to go beyond simply attempting to establish a correlation between the environmental variable and abundance. Instead, inference should be based on an understanding of the direct effect of the environmental variable on population dynamics (e.g., on one or more vital rates) and how this direct effect would be reflected in abundance.” And again, just months ago speaking before the State Water Resources Control Board, Lead Scientist of the Delta Science Program, Dr. Cliff Dahm stated when summarizing key take home messages from the “Flows and Fishes in the Sacramento-San Joaquin Delta” report, “The first one is that moving forward, we really need to focus more on cause and effect relationships, not just correlations, because correlations can sometimes be spurious.”

For more than 20 years, scientists working on Bay-Delta fishery issues have overly relied upon statistical correlations to establish environmental management regulations, and after 20 years, billions of dollars spent, millions of acre-feet dedicated, and untold socio-economic disruption, the species we have sacrificed so much for are in worse shape than ever. We cannot roll back the clock and recover 20 years of lost research opportunity, but we also do not need to spend another 20 years following the same failed path. Rather than spend the tens of millions of dollars necessary to purchase water for the FWS summer X2 outflow action, the effects of which we will likely never be able to determine, we should invest in research that will bring about tangible results, actionable information, and much needed efficacy towards advancing species management.

NEED TO EXPERIMENT

Many of the regulations steadfastly in place today began as simply hypotheses – just ideas really, many without much scientific foundation or certainty. As originally written by scientists, these

hypotheses usually contain copious caveats with words like “may” and “should”, error bands, confidence intervals, and recommended actions to test the hypothesis so that it may be refined or rejected based upon the empirical information. This process is generally referred to as the “scientific method” and it has served us well for hundreds, if not thousands of years. Enter the regulators. Well intended as they may be, their job is to build boxes. Boxes do not have windows or doors; the walls are rigid and boundaries certain. Into these boxes regulators place the hypotheses, but since the hypotheses are flexible by definition, they must be changed, specific thresholds selected, appropriate caveats replaced with words like “will” and “shall”, and the scientific method as an ongoing process is supplanted by the process of regulatory policy choices. If the policy choices are controversial, regulators often defend them by presenting false choices and certainty. For example, under the FWS BiOp we are told that the Projects’ pumping operations jeopardize delta smelt, therefore restrictions on OMR must be established and Projects’ pumping cannot exceed a specified rate. There is no evidence that entrainment of delta smelt by the Projects has a population level effect. Notwithstanding, we are told that minimizing entrainment by imposing the OMR restriction is the only way to avoid jeopardy, the false choice, and that -5,000 cfs OMR is an absolute threshold, the false certainty. Cementing the outcome, ongoing monitoring of the effectiveness of the policy choices and/or an adaptive management process for implementing and testing alternative management actions is rarely a part of the regulatory requirement. Then, if after years of implementation the chosen actions fail to produce discernable results, the false certainty present at promulgation is replaced by equivocation about the complexity of the system and challenges of demonstrating biological benefit. Meanwhile, the resultant sacrifices by water users continue unabated. Such is the history of the CVP and SWP biological opinions.

If we are to have effective environmental protections and balance various policy objectives, we must be able to test and critically evaluate the performance of the regulations currently in place. As an example, restrictions on the OMR net reverse flow have been in effect for 9 years. This regulation has effectively divorced the water supply for two-thirds of Californians residing south of the Delta from their water sources in the northern Sierras. Practically, the OMR restriction limits CVP and SWP pumping to about one-third of the Projects’ physical capacity, and to about 40% of what would be allowed under the state’s Water Quality Control Plan. As a result, the Projects have pumped less water throughout this 9 year period than in any other equivalent timeframe in Projects’ history. Yet, despite the significant cuts to pumping, delta smelt and winter-run salmon have continued to decline, raising questions as to the effectiveness of the OMR regulation. In addition, the analyses that supports the hypothesis that increasing negative OMR can result in increased fish salvage and reduced survival also demonstrate that high negative OMR can result in little and even no salvage. So, apparently other factors are at work. However, when public water agencies have requested testing pumping rates higher than allowed under the BiOps, the FWS and NMFS have disapproved. Essentially, the rationale is that an experiment to test the efficacy of operational limits set under the BiOps is not allowable because it would result in operations that exceed the limits set by the BiOps. Under this logic, we can never change the existing standard because we can never test a greater alternative management threshold.

Another example is a calendar restriction on pumping based upon a proportion of San Joaquin River inflows (Inflow:Export ratio) in the April and May timeframe under the NMFS BiOp. Essentially, in the BiOp NMFS states that what is needed to improve outmigration for listed steelhead is greater San Joaquin River flow, however, since they were unable to achieve that via the BiOp, they chose to implement a pumping restriction instead. In recent years there have been experimental survival studies

conducted in the San Joaquin River and Delta that have not detected a relationship between exports and survival of juvenile steelhead. Studies conducted with salmon have produced similar results. Unfortunately, although the available steelhead survival studies had variable pumping rates, no steelhead survival studies have tested export effects outside the boundaries of the NMFS BiOp, so they do not tell us if a greater pumping limit would also be appropriate. In order to truly assess the efficacy of this regulation, and others, in order to improve pumping potential, experimentation over a wide range of conditions is necessary; otherwise, we can be assured that when future storms come, we will not be able to capture that water either.

NEED FOR COMPREHENSIVE SOLUTIONS

The desperation behind so many of today's regulatory proposals stem from the natural concern regarding the current status of delta smelt and winter-run salmon. But too often, we are asking the wrong questions. How are the projects causing the problem, to which we have invested millions, as opposed to what is the problem, which is a very different, far more important questing that we have invested little. If we are to extricate ourselves from the species abundance, water supply death spiral we are in, we must finally begin to develop and implement comprehensive and coherent approaches that begin to address the multiple stressors we know are at work. Clearly, the current management approaches are not working but we have an opportunity before us to embrace a more diverse set of management actions over a larger spatial scale. We have the technical ability, but do we have the will?

NEED TO ADDRESS NEEDS IN THE NEAR TERM

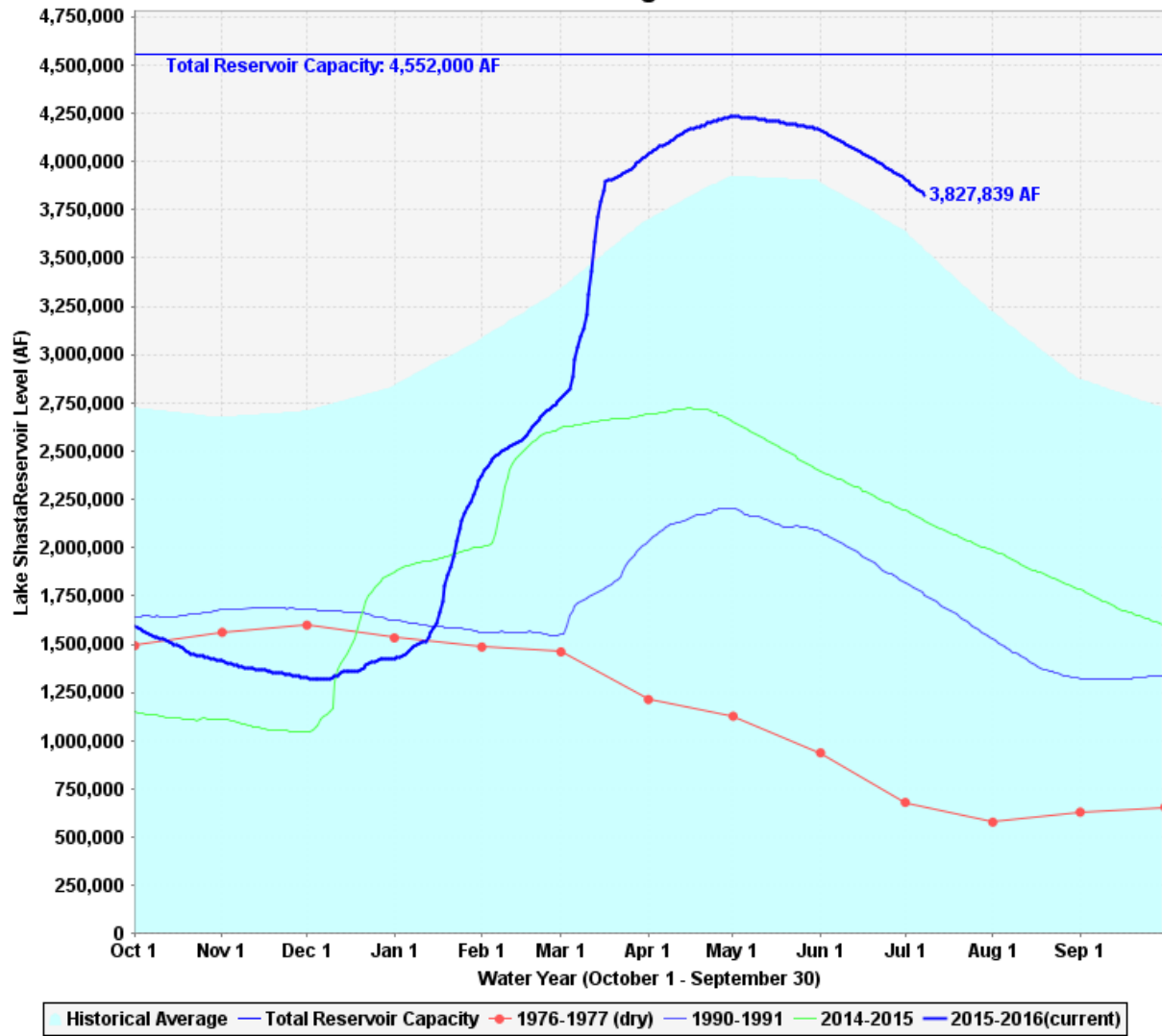
For about a decade now, the Projects and regulatory agencies have been generally focused on two areas, immediate needs, as in today's fire drill, or long term planning, such as storage or conveyance projects, like California Water Fix, that may go into operation a decade or more from now. What has been left out is everything in between. As examples, the habitat restoration called for in the BiOps, if implemented with the same zeal as water supply cuts, could have already been providing us important information, and potentially more fish, today. Hatchery improvements and a mark-select fishery could yield the fish industry improved harvest in a few short years. Predator hot spot removal could begin at any time and provide immediate relief from a significant form of fish mortality. It is not a lack of good ideas standing in our way; rather, it is a lack of will, resources, and leadership. We know what to do, we just have to go and do it.

CONCLUSION

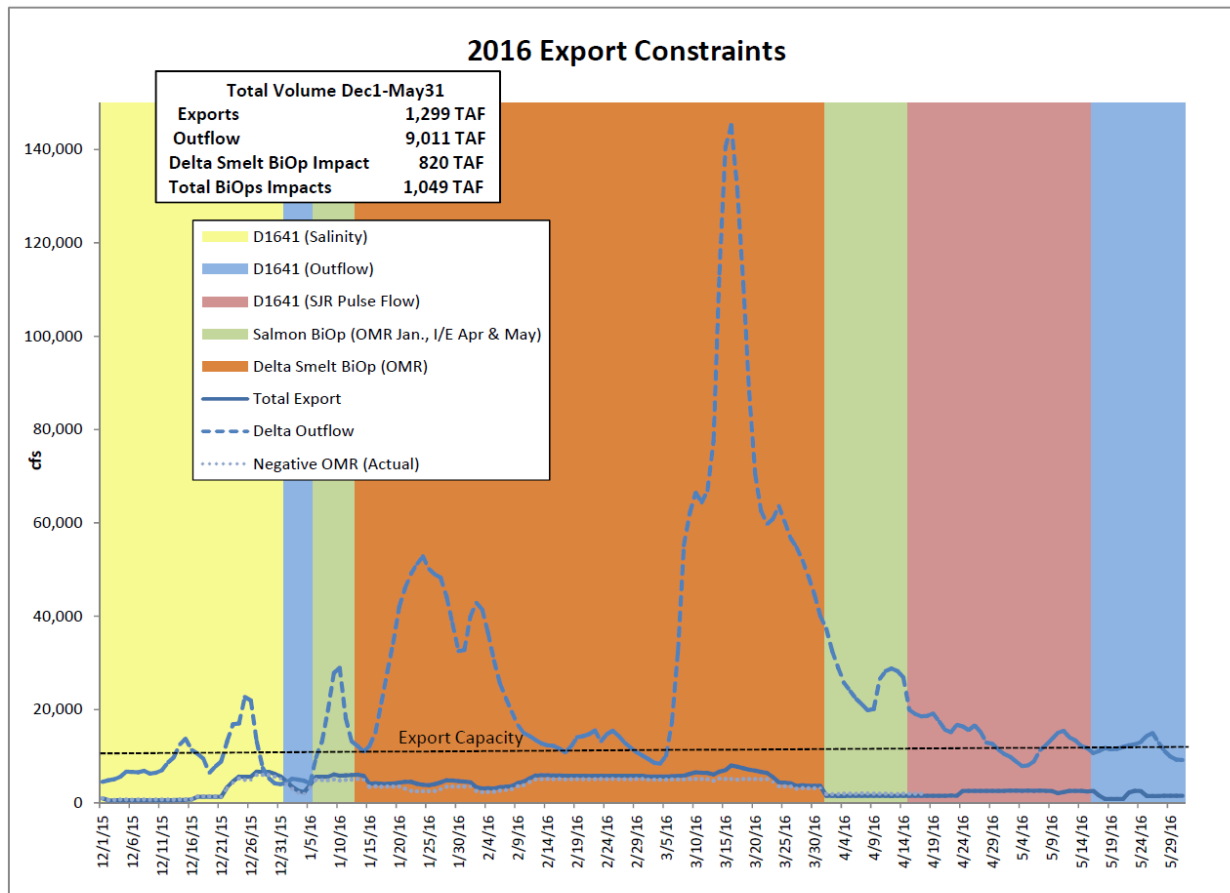
In the end, *"Changing Demands and Water Supply Uncertainty in California"* is less about how agriculture and municipalities are using water, we have been doing more with less for decades. Rather, it is about the huge increase in environmental water demand over the last quarter century due to unbridled regulation. But, unlike agricultural and municipal usage which must account for the use and ensure the benefit of each drop, environmental usage undergoes no such scrutiny. On the contrary, its benefit is simply assumed. Looking forward, it is incumbent upon us as servants of the public to question the efficacy of the water, money, and human sacrifice demanded for species management. Clearly some of what we are doing today is wholly ineffective, and yet it continues. We must reassess our approaches, broaden participation, enlist stakeholder support, and demand accountability in decision making if we are to achieve better results. I appreciate the opportunity to testify before you today and would be happy to answer any questions. Thank you.

ATTACHMENT 1

Lake Shasta Storage Levels

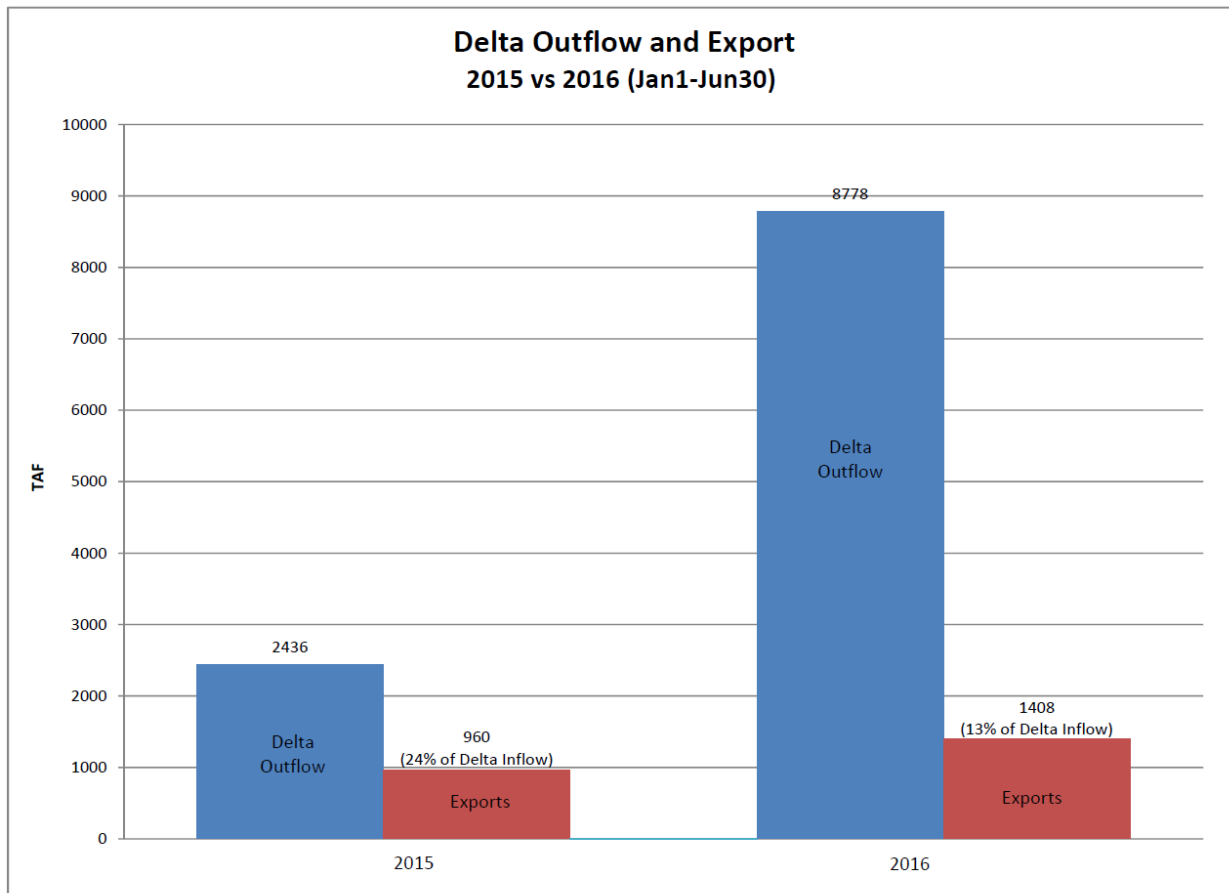


ATTACHMENT 2



T. Boardman, SLD MWA
7/7/2016

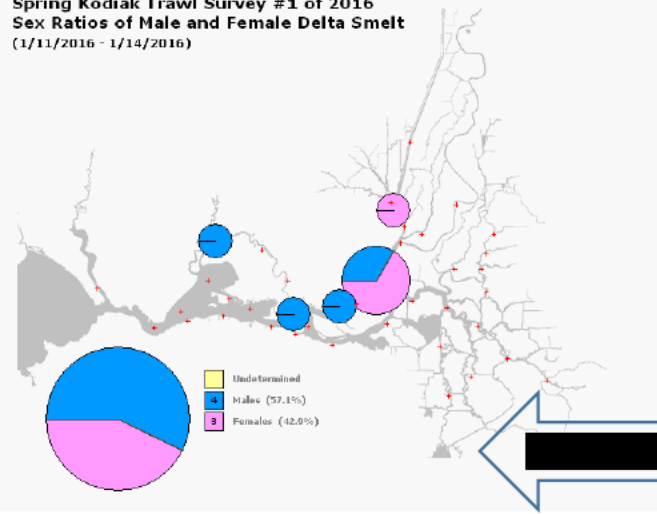
ATTACHMENT 3



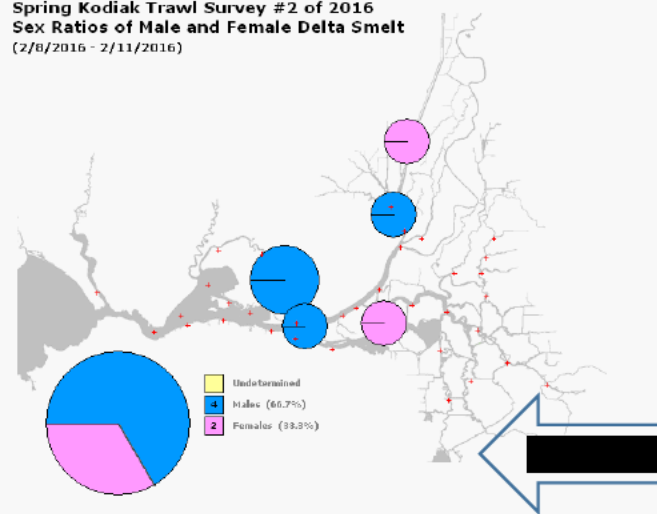
T. Boardman, SLDMWA
7/5/2016

ATTACHMENT 4

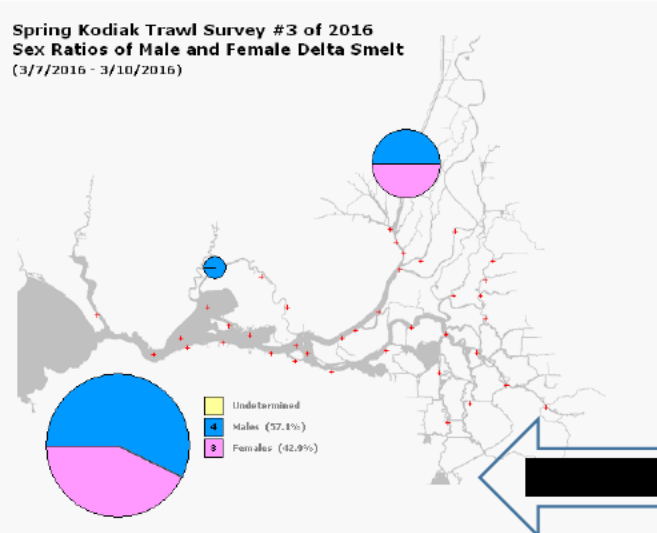
Spring Kodiak Trawl Survey #1 of 2016
Sex Ratios of Male and Female Delta Smelt
(1/11/2016 - 1/14/2016)



Spring Kodiak Trawl Survey #2 of 2016
Sex Ratios of Male and Female Delta Smelt
(2/6/2016 - 2/11/2016)



Spring Kodiak Trawl Survey #3 of 2016
Sex Ratios of Male and Female Delta Smelt
(3/7/2016 - 3/10/2016)



From: Johnny Amaral

Sent: Tuesday, July 12, 2016 10:58 AM

To: kiel.weaver@mail.house.gov; David Bernhardt

Subject: how did it go today?

From: Bernhardt, David L.

Sent: Wednesday, July 13, 2016 1:33 PM

To: 'Podolak, Chuck (Flake)'; Johnny Amaral; tbirmingham@westlandswater.org

Subject: RE: Senate committee action on drought

Thanks Chuck.

From: Podolak, Chuck (Flake) [mailto:Chuck_Podolak@flake.senate.gov]

Sent: Wednesday, July 13, 2016 4:31 PM

To: Johnny Amaral; tbirmingham@westlandswater.org

Cc: Bernhardt, David L.

Subject: Senate committee action on drought

Tom and Johnny,

This morning the Senate Energy and Natural Resources Committee passed Senator Flake's drought bill (S.2902). As you are aware the genesis of the bill was as a compliment or supplement to a California bill such as Senator Feinstein's S.2533. Unfortunately none of the three California bills (S.2533, S.1894, and H.R.2898) in the committee were able to be negotiated onto the agenda. It's not clear right now what the next step is for any of the bills, including S.2902.

We recognize the need for action on California-specific issues and want to work with the California delegation on drought issues. We are in close contact with both the House delegation and Senator Feinstein's office. I hope we can find a way for the Senate to address the water needs throughout the west and I hope to work alongside Westlands on this. Please let me know if there is anything we can do.

Chuck

Chuck Podolak, PhD | Natural Resources Policy Advisor

Office of Senator Jeff Flake

Russell 413 | Washington, DC 20510 | 202-224-4521

202-224-4951 (direct) | 202-████████ (cell)

chuck_podolak@flake.senate.gov

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From: Weaver, Kiel
Sent: Wednesday, July 13, 2016 3:58 PM
To: Johnny Amaral; David Bernhardt
Subject: RE: how did it go today?

sorry for the late response. have been buried since the hearing.

I thought it went well, but I want to get some stuff into the record. I thought the Bee article was fair

From: Johnny Amaral [jamaral@westlandswater.org]
Sent: Tuesday, July 12, 2016 1:57 PM
To: Weaver, Kiel; David Bernhardt
Subject: how did it go today?

From: Tom Birmingham

Sent: Thursday, July 14, 2016 6:50 PM

To: 'Jeff Sutton'

CC: 'Weaver, Kiel'; 'Bernhardt, David L.'; 'Akroyd, Rebecca'

Subject: Question for the Record and Response

Attachments: Question for Jeff Sutton.docx; Ltr to Chairman Fleming re Huffman's Remarks.docx

Jeff,

Attached is a draft question that could be posed to you by Mr. LaMalfa and a draft reply. By copying Rebecca Akroyd on this email, I am requesting that she cite check the letter to ensure the letter accurately quotes the NAS report and the biological opinion judicial decisions. She will forward corrections directly to you.

Thank you to agreeing to handle this matter. I hope the documents are helpful.

Tom

Question for Jeff Sutton

During the July 12, 2016 Subcommittee on Water, Power and Oceans hearing on California Water Supply Under Threat by Conflicting Federal Agencies Ranking Member Jared Huffman made the following statement:

We, the other problem is we keep making the same old claims that have been refuted and debunked time-and-again. One of them is that these biological opinions and the flow parameters that are driven by them are somehow not based on science. Now, I'll ask our witnesses from the Fish and Wildlife Service and the National Marine Fisheries Service quickly about that. These opinions were challenged in court, correct, and they were upheld by the federal courts, correct? Then at the behest of those who have continued to criticize them there was an independent peer review by none other than the National Academy of Science [sic], correct? And they were upheld as being scientifically justified by the highest peer review body in the United States of America, correct? I would hope that we can move beyond continuing to misrepresent the facts on this important issue. . . .

Do you have a response to this comment?

July __, 2016

The Honorable John Fleming
Chairman, Subcommittee on Water, Power and Oceans
1324 Longworth House Office Building
Washington, D.C. 20515

RE: Response to Question for the Record

Dear Chairman Fleming:

I have been asked to respond to comments made by Ranking Member Jared Huffman during the Subcommittee on Water, Power and Oceans July 12, 2016, hearing on California Water Supply Under Threat by Conflicting Federal Agencies. During that hearing, Mr. Huffman stated:

We, the other problem is we keep making the same old claims that have been refuted and debunked time-and-again. One of them is that these biological opinions and the flow parameters that are driven by them are somehow not based on science. Now, I'll ask our witnesses from the Fish and Wildlife Service and the National Marine Fisheries Service quickly about that. These opinions were challenged in court, correct, and they were upheld by the federal courts, correct? Then at the behest of those who have continued to criticize them there was an independent peer review by none other than the National Academy of Science [sic], correct? And they were upheld as being scientifically justified by the highest peer review body in the United States of America, correct? I would hope that we can move beyond continuing to misrepresent the facts on this important issue. . . .

If by this statement Mr. Huffman meant to imply that the science concerning the efficacy of the specific flow parameters "driven" by the biological opinions is settled, he would be wrong. Indeed, the National Academy of Sciences raised significant questions about the scientific underpinnings of these flow parameters.

In the March 19, 2010, National Academy of Sciences press release accompanying release of the report on its review of the biological opinions, the National Academy of Sciences stated:

Most of the actions proposed by two federal agencies to reduce water diversions in the California Bay-Delta in order to protect endangered and

threatened fish species are "scientifically justified," but the basis for the specific environmental triggers that would indicate when water diversions should be reduced is less well-supported by scientific analyses, says a new report from the National Research Council that was requested by Congress and the U.S. Department of the Interior. (Emphasis added.)

Indeed, the National Academy of Sciences report, entitled "A Scientific Assessment of Alternatives for Reducing Water Management Effects On Threatened and Endangered Fishes in California's Bay Delta," ("NAS Report") to which Mr. Huffman referred is replete with criticisms about the scientific basis for the specific flow parameters driven by the biological opinions. For instance, with respect to the action in the 2008 Delta smelt biological opinion to manage the contour line of 2 parts per thousand salinity, called X2, no farther upstream (east) of the Golden Gate Bridge than 74 kilometers in the fall of wet years and 81 kilometers in the fall of moderately wet years, the NAS Report stated:

The controversy about [this Action] arises from the poor and sometimes confounding relationship between indirect measures of delta smelt populations (indices) and X2. Although there is evidence that the position of X2 affects the distribution of smelt, the weak statistical relationship between the location of X2 and the size of smelt populations makes the justification for this action difficult to understand. In addition, although the position of X2 is correlated with the distribution of salinity and turbidity regimes, the relationship of that distribution and smelt abundance indices is unclear. The X2 action is conceptually sound in that to the degree that the amount of habitat available for smelt limits their abundance, the provision of more or better habitat would be helpful. However, the derivation of the details of this action lacks rigor. The action is based on a series of linked statistical analyses (e.g., the relationship of presence/absence data to environmental variables, the relationship of environmental variables to habitat, the relationship of habitat to X2, the relationship of X2 to smelt abundance). Each step of this logical train of relationships is uncertain. The relationships are correlative with substantial variance left unexplained at each step, yet the analyses do not carry the uncertainty at each step to the next step. The action also may have high water requirements and may adversely affect salmon and steelhead under some conditions. NAS Report, at 4 (emphasis added).

This criticism of the scientific basis for imposing an X2 at a particular location during fall months of wet and moderately wet years is particularly relevant to the subject of the Subcommittee's July 12 hearing because the summer Delta outflow proposal about which the Subcommittee heard testimony is designed to achieve a contour line of 2 parts per thousand salinity at a particular location during the summer months.

The criticisms expressed by the NAS Report about the scientific basis for other specific flow parameters and pumping reductions driven by the biological opinions are too numerous to repeat in this letter; however, a few highlights of these criticism are:

The concept of reducing [Old and Middle Rivers] negative flows to reduce mortality of smelt at the [State Water Project] and [Central Valley Project] facilities is scientifically justified. However, there is substantial uncertainty regarding the amount of flow that should trigger a reduction in exports. In other words, the specific choice of the negative flow threshold for initiating the RPA is less clearly supported by scientific analyses.... There clearly is a relationship between negative OMR flows and mortality of smelt at the pumps, but the data do not permit a confident identification of the threshold values to use in the action, and they do not permit a confident assessment of the benefits to the population of the action. NAS Report, at 3-4 (emphasis added).

The historical distribution of smelt on which the relationship with [Old and Middle Rivers] flows was established no longer exists. Delta smelt are now sparsely distributed in the central and southern delta and pump salvage also has been extremely low, less than 4% of the 50-year average index. Since 2005, a significant portion of the remaining smelt population, 42% (Sommer et al., 2009), is in the Cache Slough complex to the north and is therefore largely isolated from the central delta. These changes in the distribution of delta smelt increase the uncertainty surrounding current estimates of the population and its likely response to alterations in delta hydraulics, and until the numbers of smelt rise closer towards the pre-2005 levels, they do not provide a reliable index for incorporation into models for the effects of pumping on smelt salvage.... There clearly is a relationship between OMR flows and salvage rates, but the available data do not permit a confident identification of the threshold values to use in the action, and they do not permit a confident assessment of the benefits to the population of the action. NAS Report at 38-39 (emphasis added).

The controversy [surrounding Action IV.2.1 in the salmonid biological opinion] lies in the effectiveness of the component of this action that reduces water exports from the delta. The effectiveness of reducing exports to improve steelhead smolt survival is less certain, in part because with the VAMP (Vernalis Adaptive Management Plan) increase flows and reduce exports are combined, and in part because steelhead smolts are larger and stronger swimmers than Chinook salmon smolts. Furthermore, it is not clear in the biological opinion how managing exports for this purpose would be integrated with export management for other actions. The choice of a 4:1 ratio of net flows to exports appears to be the result of coordinated discussions among the interested parties. Given the weak influence of exports in all survival relationships (Newman, 2008), continued negotiation offers opportunities to reduce water use in this

specific action without great risk to salmon. Further analysis of VAMP data also offers an opportunity to help clarify the issue. The committee concludes that the rationale for increasing San Joaquin River flows has a stronger foundation than the prescribed action of concurrently managing inflows and exports. NAS Report at 45 (emphasis added).

Again, the criticisms of the scientific methodologies used by the Fish and Wildlife Service and the National Marine Fisheries Service to develop the biological opinions and of the specific flow parameters prescribed by the biological opinions are too numerous to repeat here. For your convenience, a copy of the NAS Report is attached, and I urge the Subcommittee to review this report because it belies Mr. Huffman's assertion that the National Academy of Sciences found that the specific flow parameters "driven" by the biological opinions are scientifically justified.

Moreover, it the environmental triggers and the specific flow parameters that are of greatest significance for human uses of the subject water. For example, the Delta smelt biological opinion prescribes that reverse flow in Old and Middle Rivers will be managed during the January 1 – June 30 period at rates between -1250 cubic feet per second and -5000 cubic feet per second. The difference in terms of water supply for the Central Valley Project and the State Water Project between managing reverse flow at -1250 cubic feet per second versus managing reverse flow at -5000 cubic feet per second during this period, in an average hydrologic year, would be more than one-million acre-feet of water. About this action, the NAS Report stated, "there is substantial uncertainty regarding the amount of flow that should trigger a reduction in exports. In other words, the specific choice of the negative flow threshold for initiating the RPA is less clearly supported by scientific analyses," and "the data do not permit a confident identification of the threshold values to use in the action, and they do not permit a confident assessment of the benefits to the population of the action." NAS Report at 3-4.

Mr. Huffman is correct that the biological opinions were upheld by the federal courts. But these courts were not necessarily more kind when assessing the scientific justification for the flow parameters specified by the biological opinions. After lengthy evidentiary hearings concerning the scientific justification for the biological opinions and after reviewing the administrative records for the biological opinions, the United States District Court for the Eastern District of California entered judgments that found the biological opinions were arbitrary and capricious and not supported by the best available science. See *San Luis & Delta-Mendota Water Authority v. Salazar*, 760 F. Supp. 2d 855 (E.D. Cal. 2010) and *Consolidated Salmonid Cases*, 791 F. Supp. 2d 802 (E.D. Cal. 2011). In its decisions, the District Court was highly critical of the science on which the Fish and Wildlife and the National Marine Fisheries Service relied in preparing the biological opinions. See *San Luis & Delta-Mendota Water Authority v. Salazar*, 760 F. Supp. 2d at 885, 890, 895, 913 and 922. See also *Consolidated Salmonid Cases*, 791 F. Supp. 2d at 827, 858, 898 and 909. The District Court's judgments were reversed by the United States Court of Appeals for the Ninth Circuit, but not necessarily because the appellate court disagreed with the District Court's findings. Rather the

Ninth Circuit Court of Appeals found that the District Court had improperly substituted its own judgment for that of the agency biologists who had prepared the biological opinions, who are entitled to deference. See *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 620-626 (9th Cir. 2014); see also *San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971, 996 (9th Cir. 2014). Indeed, with respect to the Delta smelt biological opinion, the Ninth Circuit Court of Appeals characterized the biological opinion as a “bit of a mess. And not just a little bit of a mess, but, at more than 400 pages, a big bit of a mess.” *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d at 604.

One portion of the Ninth Circuit Court of Appeals’ decisions that Mr. Huffman chooses to ignore is that which suggests it is up to Congress to address the issues that created by these biological opinions. In its decision related to the Delta smelt biological opinion, the appellate court stated:

We recognize the enormous practical implications of this decision. But the consequences were prescribed when Congress determined that “these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. § 1531(a)(3). As the Supreme Court observed in *Tennessee Valley Authority v. Hill*: “It may seem curious to some that the survival of a relatively small number of three-inch fish ... would require the permanent halting of a virtually completed dam,” but “the explicit provisions of the Endangered Species Act require precisely that result.” 437 U.S. 153, 172–73, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). Such species have been “afforded the highest of priorities,” by Congress, even if it means “the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds.” *Id.* at 174, 98 S.Ct. 2279 (footnote omitted). The law prohibits us from making “such fine utilitarian calculations” to balance the smelt’s interests against the interests of the citizens of California. *Id.* at 187, 98 S.Ct. 2279. Consequently, any other “[r]esolution of these fundamental policy questions” about the allocation of water resources in California “lies ... with Congress and the agencies to which Congress has delegated authority, as well as with state legislatures and, ultimately, the populace as a whole.” *Baltimore Gas & Elec.*, 462 U.S. at 97, 103 S.Ct. 2246.

It is for the reasons stated by the Ninth Circuit Court of Appeals, that the resolution of fundamental policy questions about the allocation of water resources lies with Congress, that the Tehama-Colusa Canal Authority has supported efforts by Members of the House of Representatives to enact legislation that would provide a more reasonable balance between implementation of the biological opinions and water supplies.

Thank you permitting me to testify at this important hearing and for the time that the Subcommittee has devoted to this critical issue.

From: Tom Birmingham
Sent: Thursday, July 14, 2016 7:25 PM
To: 'Jeff Sutton'
CC: 'Weaver, Kiel'; 'Bernhardt, David L.'; 'Akroyd, Rebecca'
Subject: NAS Report
Attachments: NRC BiOp Review Report 3_19_10.pdf

Jeff,

For your convenience, attached is a copy of the NAS report referenced in the draft letter.

Again, thank you.

Tom



**A Scientific Assessment of Alternatives for
Reducing Water Management Effects on Threatened
and Endangered Fishes in California's Bay Delta**
Committee on Sustainable Water and Environmental
Management in the California Bay-Delta; National
Research Council

ISBN: 0-309-12803-X, 104 pages, 6 x 9, (2010)

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**A Scientific Assessment of Alternatives for Reducing Water
Management Effects on Threatened and Endangered Fishes in
California's Bay Delta**

**Committee on Sustainable Water and Environmental Management
in the California Bay-Delta**

Water Science and Technology Board

Ocean Studies Board

Division on Earth and Life Studies

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COMMITTEE ON SUSTAINABLE WATER AND ENVIRONMENTAL MANAGEMENT IN THE CALIFORNIA BAY-DELTA^{*}

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^{*} Biographical information for committee members is in Appendix E. This project was organized and overseen by the NRC's Water Science and Technology Board (lead) and Ocean Studies Board, whose rosters are in Appendixes B and C, respectively.

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Preface

California, like many states, faces challenges related to water. Much of the state is too dry to support many human activities, such as municipal and industrial water use and irrigated agriculture, without supplementing the natural water supply. It has done this through an extensive series of engineering projects that include reservoirs, canals, levees, and pumps, largely to move water from the more humid north to the more arid and densely populated south. Much of California's natural surface-water supply flows into and through the Sacramento and San Joaquin watersheds into California's Bay-Delta, and from there through San Francisco Bay into the ocean. The delta itself is a biologically diverse estuarine ecosystem, and is the main point of diversion for water that is transported to the south.

As California's population and economic activity have increased, along with water diversions from the delta, conflicts over various water uses have increased as well, especially surrounding the bay-delta. Those conflicts have been brought to a head by restrictions on water diversions that have been required by two biological opinions, one by the U.S. Fish and Wildlife Service, covering delta smelt, and one by the National Marine Fisheries Service, covering salmon, steelhead, and sturgeon, to protect those fishes, which are listed as threatened or endangered under the federal Endangered Species Act. In addition, several recent dry years have exacerbated the situation. Conflicts over water are not new in California, but the current conflicts over the bay-delta appear to be unprecedented in their scale. Few parts of the state are unaffected by what happens to delta water.

Protecting all the listed species and preserving existing and projected uses of the region's water is a serious challenge. The complexity of the problem and the difficulty of identifying solutions have been highlighted by a plethora of scientific publications and arguments, in which many qualified and distinguished experts have reached differing conclusions. Nobody disagrees that engineering changes; the introduction of many exotic species, the addition of contaminants to the system, and the general effects of an increasing human population have contributed to the fishes' declines. There are, however, disagreements about the relative contributions of those factors and the appropriate remedies for them. This is the context in which the National Research Council was asked by Congress and the Department of the Interior to help resolve the issue by evaluating the scientific bases of the biological opinions. In response, the NRC appointed a special committee of experts to carry out a complex and challenging study in two phases.

In its first phase, the committee was tasked to focus on the scientific bases of the reasonable and prudent alternatives (RPAs) in the two biological opinions. The committee also assessed whether the RPAs might be in conflict with one another, as well as whether other options might be available that would protect the fishes with lesser impacts on other water uses. Finally, we were asked to consider the effects of "other stressors" on the fishes if sufficient time were available. The results of this first-phase analysis are the subject of this report. The committee did consider other stressors, but it did not evaluate them in depth. They will be more thoroughly addressed in a second report, scheduled to be published late in 2011, which will focus on broader

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issues surrounding attempts to provide more sustainable water supplies and to improve the ecological sustainability of the delta, including consideration of what ecological goals might be attainable.

The committee met in Davis, California for five days in January 2010. The committee heard presentations from representatives of federal and state agencies and a variety of other experts, and from members of several stakeholder groups and the public (see Appendix D). The information gathering sessions of this meeting were open to the public and widely advertised. The committee sought to hear from as many groups and individuals as possible within the time constraints. All speakers, guests, and members of the public were encouraged to provide written comments during and after the meeting. All presentations and written materials submitted were considered by the committee as time allowed. The committee thanks all the individuals who provided information.

This report was reviewed in draft form by individuals chosen for their diverse perspectives and technical expertise in accordance with the procedures approved by the NRC's Report Review Committee. The purpose of this independent review is to provide candid and critical comments that will assist the NRC in making its published report as sound as possible, and to ensure that the report meets NRC institutional standards for objectivity, evidence, and responsiveness to the study charge. The review comments and draft manuscript remain confidential to protect the integrity of the deliberative process.

We thank the following for their reviews of this report: Joan G. Ehrenfeld, Rutgers University; Mary C. Fabrizio, Virginia Institute of Marine Science; Peter Gleick, Pacific Institute; William P. Horn, Birch, Horton, Bittner & Cherot; D. Peter Loucks, Cornell University; Jay Lund, University of California, Davis; Tammy Newcomb, Michigan Department of Natural Resources; and Andrew A. Rosenberg, Conservation International.

Although these reviewers provided constructive comments and suggestions, they were not asked to endorse the report's conclusions and recommendations, nor did they see the final draft of the report before its release. The review of this report was overseen by Michael Kavanaugh, Malcolm Pirnie, Inc., who was appointed by the NRC's Report Review Committee and by Leo Eisel, Brown and Caldwell, who was appointed by the NRC's Division on Earth and Life Studies. They were responsible for ensuring that an independent examination of this report was conducted in accordance with NRC institutional procedures and that all review comments received full consideration. Responsibility for this report's final contents rests entirely with the authoring committee and the NRC.

I am enormously grateful to my committee colleagues for their diligence, enthusiasm, persistence, and hard work. The schedule for the preparation of this report was short, and without everyone's engagement, it could not have been completed. I also am grateful to David Policansky, Stephen Parker, Laura Helsabeck, Heather Chiarello, Ellen De Guzman, and Susan Roberts of the NRC staff for their efforts in facilitating the committee's meeting and for their work in helping to get this report completed on schedule in the face of historic snowstorms.

California will continue to face great challenges in managing, allocating, and using water, including managing California's Bay Delta. We hope the committee's reports can help in that difficult process.

Robert J. Huggett
Chair

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Acronyms and Abbreviations

AF	Acre-feet
BA	Biological Assessment
BO	Biological Opinion
(C)DFG	California Department of Fish and Game
(C)DWR	California Department of Water Resources
C.F.R.	Code of Federal Regulations
Cir	Circuit Court (federal system)
CVP	Central Valley Project
CVPIA	Central Valley Project Improvement Act
DCC	Delta Cross Channel
DOI	(U.S.) Department of the Interior
DSM2	Delta Simulation Model II
EDT	Ecosystem Diagnosis and Treatment
ESA	Endangered Species Act
EWA	Environmental Water Account
FMT	Fall Midwater Trawl (survey)
FWS	(U.S.) Fish and Wildlife Service
HORB	Head of Old River Barrier
MAF	Million acre-feet
M&I	Municipal and Industrial
NAS	National Academy of Sciences
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NRC	National Research Council
OCAP	Operations Criteria And Plan
OMR	Old and Middle River
OSB	Ocean Studies Board of the NRC
PTM	Particle-Tracking Model
RBDD	Red Bluff Diversion Dam
RPA	Reasonable and Prudent Alternative
SWP	State Water Project
TAF	Thousand acre-feet
USBR	United States Bureau of Reclamation
U.S.C.	United States Code
USGS	United States Geological Survey
VAMP	Vernalis Adaptive Management Plan
WSTB	Water Science and Technology Board of the NRC
X2	Contour line of salinity 2

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Summary

California's Bay-Delta estuary is a biologically diverse estuarine ecosystem that plays a central role in the distribution of California's water from the state's wetter northern regions to its southern, arid, and populous cities and agricultural areas. In addition to its ecological functioning and the ecosystem services it provides, there are numerous withdrawals of freshwater from the delta, the largest being pumping stations that divert water into the federal Central Valley Project (CVP) and the State Water Project (SWP), primarily for agriculture and metropolitan areas. Most former wetland and marsh areas of the delta have been drained for agriculture, and are protected by an aging collection of levees. Some of those areas also contain small urban settlements.

This hydrologic and engineered system has met the diverse water-related needs of Californians for decades. But operation of the engineered system, along with the effects of an increasing population of humans and their activities, has substantially altered the ecosystem. These ecosystem changes have contributed to changes in the abundance, distribution, and composition of species in the delta, including the decline of many native species and the successful establishment of many species not native to the region.

Recently, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) issued biological opinions under the federal Endangered Species Act (ESA) that required changes ("reasonable and prudent alternatives," or RPAs) in water operations and related actions to avoid jeopardizing the continued existence and potential for recovery of delta smelt, winter-run and fall-run Chinook salmon, Central Valley steelhead, and green sturgeon. Those changes have reduced the amount of water available for other uses, and the tensions that resulted have been exacerbated by recent dry years.

The RPAs are divided into many separate actions. The RPA in the FWS opinion, divided into 6 actions, applies to delta smelt and thus focuses primarily on managing flow regimes to reduce entrainment of smelt and on extent of suitable water conditions in the delta, as well as on construction or restoration of habitat. The NMFS RPA, divided into 5 actions with a total of 72 subsidiary actions, applies to the requirements of Chinook salmon, steelhead, and green sturgeon in the delta and farther upstream. In addition to its focus on flow regimes and passage, it includes purchasing water to enhance in-stream flow, habitat restoration, a new study of acoustic-tagged steelhead, and development of hatchery genetics management plans. This committee did not evaluate all 78 actions and subsidiary actions in the two RPAs in detail. It spent most of its time on the elements of the RPAs that have the greatest potential to affect water diversions. It also spent time on elements whose scientific justifications appear to raise some questions.

Protecting all the listed species, as required by the ESA, while simultaneously trying to minimize impacts on existing and projected uses of the region's water, is a serious challenge. In addition, many anthropogenic and other factors, including pollutants; introduced species; and engineered structures such as dams, canals, levees, gates, and pumps adversely affect the fishes in the region, but they are not under the direct control of the CVP or the SWP, and thus are not subjects of the biological opinions.

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The complexity of the problem of the decline of the listed species and the difficulty of identifying viable solutions have led to disagreements, including concerns that some of the actions in the RPAs might be ineffective and might cause harm and economic disruptions to water users, and that some of the actions specified in the RPAs to help one or more of the listed species might harm others. In addition, some have suggested that the agencies might be able to meet their legal obligation to protect species with less economic disruptions to other water users. Those concerns led the Department of the Interior and Congress to ask for advice from the National Research Council (NRC), which appointed a special committee of experts to carry out this study.

THE COMMITTEE'S CHARGE

The committee's charge includes the following tasks (the full statement of task is in Appendix A).

The committee was asked to undertake two main projects over a term of two years resulting in two reports. The first report, prepared on a very short timeline, was to address scientific questions, assumptions, and conclusions underlying water-management alternatives (i.e., the RPAs) in the two biological opinions mentioned above, and this is where the committee focused most of its attention. In addition, three specific issues were to be addressed. First, are there any "reasonable and prudent alternatives" (RPAs) that, based on the best available scientific data and analysis, would provide equal or greater protection for the listed species and their habitat while having lesser impacts to other water uses than those adopted in the biological opinions? Second, are there provisions in the biological opinions to resolve the potential for actions that would benefit one listed species while causing negative impacts on another? And finally, to the extent that time permits, the committee was asked to consider the effects of other stressors (e.g., pesticides, ammonia discharges, invasive species) on federally listed and other at-risk species in the Bay-Delta. The committee's second report, due in late 2011, will address how to most effectively incorporate science and adaptive management concepts into holistic programs for management and restoration of the Bay-Delta.

The committee's charge was to provide a scientific evaluation, not a legal one, and that is what the committee did. **Nothing in this report should be interpreted as a legal judgment as to whether the agencies have met their legal requirements under the ESA.** The committee's report is intended to provide a scientific evaluation of agency actions, to help refine them, and to help the general attempt to better understand the dynamics of the delta ecosystem, including the listed fishes.

THE COMMITTEE'S PRINCIPAL CONCLUSIONS

Context

The California Bay-Delta is a system that has undergone significant anthropogenic changes for more than a century. Those changes include water withdrawals; draining of wetlands; introduction of many nonnative species of plants and animals, some deliberate; construction of canals, gates, marinas, roads, levees, pumps, dams, and other structures that affect the hydrology of the system; the damming of almost all the major rivers and tributaries to the system, which also

has altered the seasonal flow regime and other hydrologic aspects of the system; and the release of contaminants, pollutants, and nutrients into the system as a result of the above changes and the increase of agriculture, industrial and residential development, and other human activities. All these changes have affected the distribution, abundance, and composition of species in the delta, some of which have increased dramatically and some, including the species listed under the Endangered Species Act (Chinook salmon, delta smelt, steelhead, and green sturgeon), which have declined precipitously. The biological opinions with their associated RPAs that the committee has reviewed relate only to proposed changes in operations of the CVP and the SWP in the delta and methods to reduce the adverse effects on the listed species of those changes. Some restrictions on CVP and SWP water diversions have been initiated to protect the listed fish species, but so far have not produced measurable effects in slowing their declines.

The committee concludes that reversing or even slowing the declines of the listed species cannot be accomplished immediately. Even the best-targeted methods of reversing the fish declines will need time to take effect amid changing environmental conditions such as multi-year droughts and continued pressures on the system from other human-caused stresses. Especially for fishes whose populations are very low already, the effects of any actions will be difficult to detect at first, and detecting them will be made more difficult by the effects of other environmental changes and uncertainties inherent in sampling small populations.

The FWS Biological Opinion and RPA

The committee considered the six actions contained within the RPA, most of which were judged to have a sound conceptual basis. The committee then focused on the RPA actions that involved Old and Middle River (OMR) flows, the management of the mean position of the contour where salinity is 2¹ (X2), and the creation or restoration of tidal habitat for smelt. The first two actions involve significant requirements for water; the third does not.

The management of OMR flows is predicated on the concept that pumping of water for export from the south delta creates net negative (upstream) flows, averaged over the tidal cycle, that cause delta smelt (and some juvenile salmon) to experience increased mortality in the south delta, especially in winter. The RPA action limits the net OMR flows to levels that depend on conditions during this period, with a variety of environmental triggers and adaptive-management procedures. **Although there are scientifically based arguments that raise legitimate questions about this action, the committee concludes that until better monitoring data and comprehensive life-cycle models are available, it is scientifically reasonable to conclude that high negative OMR flows in winter probably adversely affect smelt populations. Thus, the concept of reducing OMR negative flows to reduce mortality of smelt at the SWP and CVP facilities is scientifically justified.**

However, there is substantial uncertainty regarding the amount of flow that should trigger a reduction in exports. In other words, the specific choice of the negative flow threshold for initiating the RPA is less clearly supported by scientific analyses. The biological benefits and the water requirements of this action are likely to be sensitive to the precise values of trigger and threshold values. There clearly is a relationship between negative OMR flows and mortality of smelt at the pumps, but the data do not permit a confident identification of the threshold values to

¹ This is often expressed as a concentration, e.g., "2 parts per thousand," but more recently it has been expressed as a ratio of electrical conductivities, hence it has no units.

use in the action, and they do not permit a confident assessment of the benefits to the population of the action. As a result, the implementation of this action needs to be accompanied by careful monitoring, adaptive management, and additional analyses that permit regular review and adjustment of strategies as knowledge improves.

The management of the mean position of X2 during the fall (Action 4 of the FWS RPA) is based on observations that relate smelt use of spawning habitat with various salinity regimes. X2 is interpreted by the agencies not as a single line, but rather as an indicator of the spatial pattern of salinity in the delta and thus as indicative of the extent of habitat favorable for delta smelt.

The relationships among smelt abundance, habitat extent, and the mean position of X2 as an indicator of available habitat are complex. The controversy about the action arises from the poor and sometimes confounding relationship between indirect measures of delta smelt populations (indices) and X2. Although there is evidence that the position of X2 affects the distribution of smelt, the weak statistical relationship between the location of X2 and the size of smelt populations makes the justification for this action difficult to understand. In addition, although the position of X2 is correlated with the distribution of salinity and turbidity regimes, the relationship of that distribution and smelt abundance indices is unclear. The X2 action is conceptually sound in that to the degree that the amount of habitat available for smelt limits their abundance, the provision of more or better habitat would be helpful. However, the derivation of the details of this action lacks rigor. The action is based on a series of linked statistical analyses (e.g., the relationship of presence/absence data to environmental variables, the relationship of environmental variables to habitat, the relationship of habitat to X2, the relationship of X2 to smelt abundance). Each step of this logical train of relationships is uncertain. The relationships are correlative with substantial variance left unexplained at each step, yet the analyses do not carry the uncertainty at each step to the next step. The action also may have high water requirements and may adversely affect salmon and steelhead under some conditions. **As a result, the committee concludes that how specific X2 targets were chosen and their likely beneficial effects need further clarification. It also is critical that the adaptive-management requirements included in the RPA be implemented in light of the uncertainty about the biological effectiveness of the action and its possibly high water requirements.**

The tidal habitat management action in the RPA requires creation or restoration of 8,000 acres of intertidal and subtidal habitat in the delta and in Suisun Marsh. This action has not been controversial because it does not affect other water users. **The committee finds that the conceptual foundation for this action (Action 6) is weak because the relationship between tidal habitats and food availability for smelt is poorly understood. The details of its implementation are not fully justified in the biological opinion. The committee recommends that this action be implemented in phases, with the first phase to include the development of an implementation and adaptive management plan (similar to the approach used for the floodplain habitat action in the NOAA biological opinion), but also to explicitly consider the sustainability of the resulting habitats, especially those dependent on emergent vegetation, in the face of expected sea-level rise.** In addition, there should be consideration of the types and amounts of tidal habitats necessary to produce the expected outcomes and how they can be achieved and sustained in the long term. The committee supports the monitoring program referred to in Action 6, and appropriate adaptive management triggers and actions.

The NMFS Biological Opinion and RPA

The NMFS RPA for salmon, steelhead, and green sturgeon is a broad complex of diverse actions spanning three habitat realms: tributary watersheds, the mainstem Sacramento and San Joaquin Rivers, and the delta. **On balance, the committee concludes that the actions, which are primarily crafted to improve life-stage-specific survival rates for salmon and steelhead, with the recognition that the benefits also will accrue to sturgeon, are scientifically justified.** The strategies underpinning many of the individual actions are generally well supported by more than a decade of conceptual model building about the requirements of salmonids in the region, although the extent to which the intended responses are likely to be realized is not always clearly addressed in the RPA. Given the absence of a transparent, quantitative framework for analyzing the effects of individual and collective actions, it is difficult to make definitive statements regarding the merits of such a complex RPA. Indeed, absent such an analysis, the controversial aspects of some of the RPA actions could detract from the merits of the rest of the RPA.

In general, as described in detail in Chapter 6, the committee concludes that although most, if not all, of the actions in this RPA had a sound conceptual basis, the biological benefits and water requirements of several of the actions are, as with the delta smelt actions, likely quite sensitive to the specific triggers, thresholds, and flows specified. As a result, the committee recommends that the specific triggers, thresholds, and flows receive additional evaluation that is integrated with the analyses of similar actions for delta smelt.

In particular, the committee concludes that it is difficult to ascertain to what extent the collective watershed and tributary actions will appreciably improve survival within the watershed or throughout the entire river system. The committee concludes that the actions to improve mainstem passage for salmonids and sturgeon, in particular those concerning the Red Bluff Diversion Dam, are well justified scientifically. The committee recommends some kind of quantitative assessment framework for assessing survival be developed and implemented.

The management of OMR flows to reduce entrainment mortality of salmon smolts is similar in concept to the smelt OMR action, and like that action, **the committee concludes that its conceptual basis is scientifically justified, but the scientific support for specific flow targets is less certain. Uncertainty in the effect of the triggers should be reduced, and more-flexible triggers that might require less water should be evaluated.**

Another set of actions in this RPA focuses on managing exports and flows in the San Joaquin River to benefit outmigrating steelhead smolts. The actions are intended to reduce the smolts' vulnerability to entrainment into the channels of the south delta and the pumps by increasing the inflow-to-export ratio of water in the San Joaquin River. It thus has two components: reducing exports and increasing San Joaquin River inflows into the delta. **The committee concludes that the rationale for increasing San Joaquin River flows has a stronger foundation than does the prescribed export action. We further conclude that the action involving a 6-year study of smolt survival would provide useful insight into the effectiveness of the actions as a long-term solution.**

The final two actions considered here were improving the migratory passage of salmon and sturgeon through the Yolo Bypass and the creation of additional floodplain lands to provide additional rearing habitat for juvenile salmon. **The committee concludes that both actions are scientifically justified, but the implications for the system as a whole of routing additional flows through the Yolo Bypass for the system were not clearly analyzed.** In particular, the

consequences of the action for Sacramento River flows and for the potential mobilization of mercury were not clearly described.

Other Possible RPAs

The committee's charge requires the identification, if possible, of additional potential RPAs that might have the potential to provide equal or greater protection to the fishes than the current RPAs while costing less in terms of water availability for other uses. **The committee considered a variety of possible actions not in the RPAs (see Chapter 6), and concluded that none of them had received sufficient documentation or evaluation to be confident at present that any of them would have the potential to provide equal or greater protections for the species while requiring less disruption of delta water diversions.**

Other Stressors

Based on the evidence the committee has reviewed, the committee agreed that the adverse effects of all the other stressors on the listed fishes are potentially large. Time did not permit full exploration of the issue in this first report, but examples of how such stressors may affect the fishes are described. The committee will explore this issue more thoroughly in its second report.

Modeling

The committee reviewed the models the agencies used to understand the basis for the resource agencies' jeopardy opinion and to determine to what degree they used the models in developing the RPAs. **The committee concluded that as far as they went, despite flaws, the individual models were scientifically justified, but that they needed improvements and that they did not go far enough toward an integrated analysis of the RPAs. Thus the committee concluded that improving the models by making them more realistic and by better matching the scale of their outputs to the scale of the actions, and by extending the modeling framework to be more comprehensive and to include features such as fish life cycles would improve the agencies' abilities to assess risks to the fishes, to fine-tune various actions, and to predict the effects of the actions.**

Potential Conflicts Between RPAs and Integration of RPAs

The committee concludes that the RPAs lack an integrated quantitative analytical framework that ties the various actions together within species, between smelt and salmonid species, and across the watershed. This type of systematic, formalized analysis, although likely beyond the two agencies' legal obligations when rendering two separate biological opinions, is necessary to provide an objective determination of the net effect of all their actions on the listed species and on water users.

An additional overall, systematic, coordinated analysis of the effect of all actions taken together and a process for implementing the optimized, combined set of actions is required to establish the credibility of the effort overall. The committee is aware that instances of coordination among the agencies certainly exist, including modification of actions to reduce or eliminate conflicting effects on the species. Indeed, the committee did not find any clear example of an action in one of the RPAs causing significant harm to the species covered in the other RPA. But coordination is not integration. The lack of a systematic, well-framed overall analysis is a serious scientific deficiency, and it likely is related to the ESA's practical limitations as to the scope of actions that can or must be considered in a single biological opinion. The interagency effort to clearly reach consensus on implications of the combined RPAs for their effects on all the species and on water quality and quantity within the delta and on water operations and deliveries should use scientific principles and methods in a collaborative and integrative manner. Similarly, this committee's efforts to evaluate potential harmful effects of each RPA on the species covered in the other RPA were hampered by the lack of a systematic, integrated analysis covering all the species together. Full documentation of decisions should be part of such an effort, as should inclusion of the environmental water needs of specific actions and for the entire RPA.

It is clear that integrative tools that, for example, combine the effect over life stages into a population-level response would greatly help the development and evaluation of the combined actions. There has been significant investment in hydrological and hydrodynamic models for the system, which have been invaluable for understanding and managing the system. An investment in ecological models that complement and are integrated with the hydrological and hydrodynamics models is sorely needed. Clear and well-documented consideration of water requirements also would seem well advised because some of the actions have significant water requirements. Credible documentation of the water needed to implement each action and the combined actions, would enable an even clearer and more logical formulation of how the suite of actions might be coordinated to simultaneously benefit the species and ensure water efficiency. **This recommendation for integration of models and across species responds to the committee's broad charge of advising on how to most effectively incorporate scientific and adaptive-management concepts into holistic programs for managing the delta, and likely goes beyond the agencies' bare legal obligations under the ESA, and will be addressed more thoroughly in the committee's second report.**

1

Introduction

California's Bay-Delta estuary is a biologically diverse estuarine ecosystem that plays a central role in the distribution of California's water from the state's wetter northern regions to its southern, arid, and populous cities and agricultural areas (Figure 1-1). The Bay-Delta region receives water flows from the Sacramento and San Joaquin Rivers and their tributaries, which drain the east slopes of the Coast Range, the Trinity Alps and Trinity Mountains in northern California, and the west slopes of the Sierra Nevada Mountains. Outflows from the Bay-Delta, through San Francisco Bay and into the Pacific Ocean, are met by tidal inflows, resulting in a brackish water ecosystem in many reaches of the Bay-Delta. In addition to its ecological functioning and the ecosystem services it provides, there are numerous withdrawals of freshwater from the Bay-Delta, the largest being pumping stations that divert water into the federal Central Valley Project (CVP), primarily for Central Valley agriculture, and the State Water Project (SWP), primarily for southern California metropolitan areas. Other water is extracted from Bay-Delta waterways for consumptive use within the delta region itself, and for municipal and industrial use around the margins of the delta, and returned to its waterways diminished in quantity and quality. Most former wetland and marsh areas of the delta have been drained for agriculture, and are protected by an aging collection of levees (Moyle et al., 2010). Some of those areas also contain small urban settlements.

This hydrologic and engineered system has met the diverse water-related needs of Californians for decades. But construction and operation of the engineered system, along with the effects of an increasing population of humans and their activities, have substantially altered the ecosystem. Current conditions include altered water-quality and salinity regimes and the magnitude and direction of flows in the delta, with rigorous management of the location of the contour where salinity is 2^2 (known as X2) through flow releases from upstream reservoirs. Consequent changes in the abundance, distribution, and composition of species in the delta have been compounded by the introduction and invasion of many species not native to the region.

Recently, several species of native fishes have been listed as threatened or endangered under the federal Endangered Species Act (ESA) and the California Endangered Species Act. This study focuses only on the federal ESA. The federal listings have led to Section 7 (of the ESA) consultations between the operators of the CVP (the U.S. Bureau of Reclamation, or USBR) and of the SWP (the California Department of Water Resources, or DWR) and the Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), and the California Department of Fish and Game (DFG). Those consultations led to the issuance of opinions by the Services that required changes ("reasonable and prudent alternatives," or RPAs) in water operations and related actions to avoid jeopardizing the continued existence and potential for recovery of delta smelt (*Hypomesus transpacificus*), winter-run and fall-run Chinook salmon (*Oncorhynchus*

² This is often expressed as a concentration, e.g., "2 parts per thousand," but more recently it has been expressed as a ratio of electrical conductivities, hence it has no units.

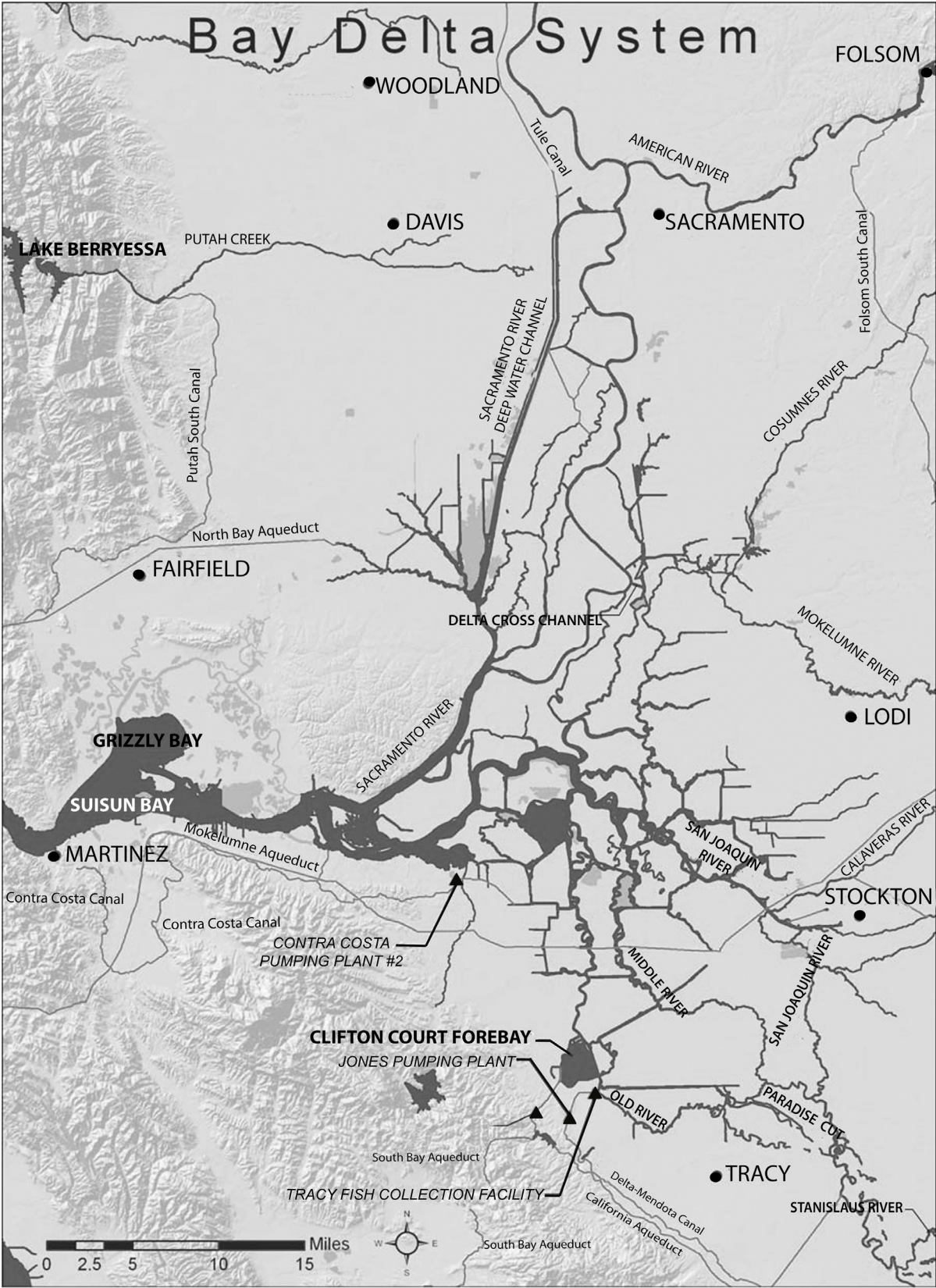


FIGURE 1-1 Map of the delta. Source: FWS, 2008.

tshawytscha), Central Valley steelhead (*Oncorhynchus mykiss*), and green sturgeon (*Acipenser medirostris*). The impacts of the RPAs on water users and the tensions that resulted have been exacerbated recently by series of dry years. In the longer term, climate change presents uncertainties and challenges with its anticipated impact on precipitation, snowpack, streamflow, and rising sea level, which will affect not only salinity and riparian habitats in the delta but likely also will threaten the integrity of the extensive system of levees (1,100 miles in length).

The RPAs are divided into many separate actions. The RPA in the FWS opinion (FWS, 2008), divided into 6 actions, focuses primarily on the flow and storage regimes as affected by diversions (pumping water to the south) and on reducing entrainment, with some focus on habitat. The NMFS RPA (NMFS, 2009) is divided into 5 actions with a total of 72 subsidiary actions. In addition to its focus on flow regimes, storage, and passage, it includes purchasing water to enhance in-stream flow, habitat restoration, a new study of acoustic-tagged steelhead, and development of hatchery genetics management plans. This committee did not evaluate all 78 actions and subsidiary actions in the two RPAs in detail. It spent most of its time on the elements of the RPAs that have the greatest potential to affect water diversions. It also spent time on elements whose scientific justifications appear to raise some questions.

Protecting all the listed species and preserving existing and projected uses of the region's water is a serious challenge. As the NMFS biological opinion (NMFS 2009) says, "the current status of the affected species is precarious," and "it has been difficult to formulate an RPA that is likely to avoid jeopardy to all listed species and meets all regulatory requirements." Adding to this difficulty is the existence of the many anthropogenic and other factors that adversely affect the fishes in the region but which are not under the direct control of the CVP or the SWP, and thus are not subjects of the biological opinions³. These include other human modifications to the system, including pollutants; invasive species and altered species composition; and engineered structures such as dams, canals, gates, pumps, and levees.

The complexity of the problem of the decline of the listed species and the difficulty of identifying solutions to it have led to disagreements, including concerns that some of the actions in the RPAs might cause harm and economic disruptions to many water users, and that some of the actions specified in the RPAs to help one or more of the listed species might harm others.

SYSTEM OVERVIEW

Overview of System Hydrology

We briefly describe the Sacramento-San Joaquin delta (Figure 1) and the two massive water storage and delivery projects that affect the area. Several publications go into great detail describing the delta and the operations of the federal and state water systems (DWR, 2006, 2009a, 2009b; USBR, 2006).

The Central Valley Project (CVP) operated by the U.S. Bureau of Reclamation and the State Water Project operated by the California Department of Water Resources provide water to farms and cities in an area encompassing the majority of the land and population of California. The two projects constitute the largest agriculture and municipal water-supply system in the United States. Water supplying both projects ultimately comes mainly from California's two major

³ Those other mainly adverse changes are considered as part of the "environmental baseline."

river systems—the Sacramento and the San Joaquin—with substantial imports from the Trinity River. Water also is stored in several major reservoirs as well, including Shasta (capacity 4.6 million acre-feet⁴, or MAF), Oroville (3.4 MAF), Trinity (2.4 MAF), New Melones (2.4 MAF), San Luis (2 MAF), Don Pedro (2 MAF), McClure (Exchequer) (1 MAF), and Folsom (1 MAF), as well as many smaller ones. Releases from those reservoirs are used to help manage flows and salinity in the delta, as well as being used for agriculture, municipal and industrial uses, recreation, flood protection, and hydropower.

The CVP provides about 5 MAF of water to agriculture each year (about 70 percent of the CVP's supply), 0.6 MAF for municipal and industrial (M&I) use (serving about 2 million people) and 1.4 MAF to sustain fish, wildlife, and their habitats. The SWP provides about 70 percent of its water to M&I customers (about 20 million people) and 30 percent to agriculture (about 660,000 acres of irrigated farmland). The largest SWP contractor is the Metropolitan Water District of Southern California, which receives about 50 percent of SWP deliveries in any one year. At least two-thirds of the population of California depends on water delivered from these projects as a primary or supplemental source of supply. Other important functions provided by both projects include flood protection, recreation, power generation, and water quality to preserve fish and wildlife.

Both projects preceded and accommodated the explosive growth of California's economy and population. The CVP was begun in the mid to late 1930s and the SWP was begun in the 1960s. Dozens of reservoirs and lakes, pumping facilities, and over 1,200 miles of pipelines and canals make up the two interdependent water-supply and delivery systems.

The Sacramento-San Joaquin Delta

In the middle of both systems and connecting the northern water supply reservoirs and southern water demands is the Sacramento-San Joaquin Delta (Figure 1-1). Thus, the delta is an integral part of the water-delivery infrastructure for both the SWP and CVP. While the focus of this report is the determination of the effects of water allocations for fish, there are many other requirements that must be met in the delta to maintain flows and quality for the many uses of water delivered by the SWP and CVP projects.

Two major pumping plants draw water from the channels and rivers feeding the delta. The SWP pumping plant (Banks Pumping Plant) can deliver an average flow of nearly 6,700 cubic feet per second (cfs) to Clifton Court Forebay for transport to users south of the delta. The Jones Pumping Plant withdraws water primarily from Old River and has the capability of 4,600 cfs to contractors in southern California. Relatively small amounts of water are extracted for the Contra Costa canal (up to 195,000 af or 195 thousand acre-feet {TAF} per year) and the North Bay Aqueduct (up to 71 TAF per year) (FWS, 2008). In addition, diversions occur upstream of the delta. These diversions affect the location of X2, the amount of water that can be withdrawn at the pumps, the flow in the San Joaquin River, and other factors.

⁴ An acre-foot is the amount of water required to cover an acre of land to a depth of one foot; it is equal to 43,560 cubic feet, 325,851 gallons, or 1,234 cubic meters of water.

THE PRESENT STUDY

The statement of task (Appendix A) charges the NRC committee to review the scientific basis of the Services' RPAs and advise on how to most effectively incorporate science and adaptive management concepts into holistic programs for management and restoration of the delta. To balance the need to inform near-term decisions with the need for an integrated view of water and environmental management challenges over the longer-term, the committee was tasked to produce two reports. This first report focuses on the scientific bases of the water-management alternatives (RPAs) in the two biological opinions and whether there might be possible alternative RPAs that would be as or more protective of the fishes with lesser impacts on other water uses. The committee also has considered "other stressors," as specified in its statement of task. These are stressors not necessarily directly associated with the water projects; they are part of the "environmental baseline," a concept related to the Endangered Species Act that refers to other anthropogenic modifications of the environment. As such, they are not addressed by the RPAs, because RPAs must address operations of the water projects.

In this first report, most of the committee's focus has been on the question of the scientific bases of the water-management alternatives (RPAs) in the biological opinions, with a smaller focus on potential conflicts between the RPAs, potential alternative RPAs, and other stressors. The committee's second report will focus on broader issues surrounding attempts to provide more sustainable water supplies and to improve the ecological sustainability of the delta, including consideration of what ecological goals might be attainable.

To prepare this report, the committee met in Davis, California for five days in January 2010. It heard presentations from representatives of federal and state agencies and a variety of other experts, and from members of the public, and began work on the report. The committee was able to consider information received by February 8. Additional writing and two teleconferences occurred in February, and the report was reviewed according to the NRC's report-review procedure (the reviewers are acknowledged in the preface).

2

The Legal Context of This Report

SCOPE OF THE COMMITTEE'S TASK

The committee was asked “to review the scientific basis of actions that have been and could be taken to simultaneously achieve both an environmentally sustainable Bay-Delta and a reliable water supply.” While this committee’s review is scientific, and not legal, the committee nonetheless recognizes the importance of the legal context within which its evaluation takes place. The standard of review applicable in legal challenges to the opinions and associated RPAs provides a useful reference. In such lawsuits, courts will invalidate the RPAs only if they are demonstrated to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” (Administrative Procedure Act, 5 U.S.C. § 706(2)(A)). Courts are reluctant to second-guess technical agency judgments and may not substitute their judgment for that of the agency, particularly in cases where there are scientific uncertainty and differing scientific views. *See* Aluminum Co. of America v. Bonneville Power Administration, 175 F.3d 1156 (9th Cir. 1999); Trout Unlimited v. Lohn, 559 F.3d 946 (9th Cir. 2009). Thus, while the committee can come to different conclusions than the agencies did in their biological opinions, that would not be a *legal* justification for deeming them inadequate, as long as the agencies adequately considered the available scientific data and their conclusions are supportable by the evidence. Similarly, the RPAs should not be considered *legally* inadequate simply because different alternatives could be scientifically justified, as long as the agencies could reasonably believe that their RPAs would avoid the likelihood of jeopardy.

Some aspects of the committee’s task require it to make determinations beyond the scope of the agencies’ legal obligations or authority when issuing a biological opinion and RPAs. For example, the committee’s charge includes consideration of the effects of stressors such as pesticides, ammonium, and invasive species on federally listed and other at-risk species in the Bay-Delta—stressors likely beyond the action agencies’ legal authority to regulate, unless the effects are indirectly changed by the RPAs. Any such considerations by this committee in this or in its second report would have no bearing on the question of whether or not the biological opinions and RPAs are legally adequate. Instead, such considerations should be interpreted in contexts apart from the biological opinion and RPAs, such as the Bay-Delta Conservation Program (development of a habitat conservation plan); the State Water Resources Control Board’s development of flow criteria for the delta; the Delta Stewardship Council’s development of a delta plan; and others.

POTENTIAL VIOLATIONS OF ESA SECTION 7 AND SECTION 9

In each biological opinion, the relevant wildlife agency concluded that the proposed federal action—implementation of the water projects’ operations plan—was likely to “jeopardize” the

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continued existence of species listed as endangered and to adversely modify their critical habitat. This would violate Section 7 of the Endangered Species Act (ESA), which requires agencies to “insure” that any actions they authorize, fund, or carry out are not likely to jeopardize endangered species or to destroy or adversely modify the species’ critical habitat (16 U.S.C. § 1536 (a) (2)). As defined by agency regulations, “jeopardy” means that the proposed action “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of [relevant endangered species] in the wild by reducing the reproduction, numbers, or distribution of that species” (50 C.F.R. § 402.02). As required by the ESA, the wildlife agencies suggested “reasonable and prudent alternatives” (RPAs) that would allow the action to go forward without violating Section 7 (16 U.S.C. § 1536 (B) (3) (A)).

In addition to the jeopardy determinations (generally, applying to species as a whole), both biological opinions found that the proposed action would “take” individual members of the endangered populations in violation of Section 9 of the ESA. By regulation, the “take” of an endangered species includes “an act which actually kills or injures wildlife” and may include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering” (*Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687 (1995)).

The resource agencies, the National Marine Fisheries Service and the Fish and Wildlife Service, issued an “incidental take statement,” in the present case, setting forth reasonable and prudent measures necessary and appropriate to minimize the effect of the proposed action on endangered species. If the action agencies (the Bureau of Reclamation and the California Department of Water Resources) comply with those measures, including monitoring and reporting requirements, then any “takes” that result from project operations will be deemed “incidental,” and they will be exempt from the prohibitions of Section 9.

STANDARDS FOR THE PREPARATION OF BIOLOGICAL OPINIONS

Best Available Data

Under the ESA, the agencies must develop their biological opinions and associated RPAs using the “best scientific and commercial data available” (16 U.S.C. § 1536 (a) (2)). Courts have emphasized the qualifier *available*, explaining that perfect data are not required. Action can be taken based on imperfect data, so long as the data are the best available. In addition, the above requirement does not remove the agency’s discretion to rely on the reasonable judgments of its own qualified experts, even if others, even a court, might find alternative views more persuasive (see *Aluminum Co. v. Bonneville Power Admin.*, 175 F.3d 1156 (9th Cir. 1999)).

Thus, the courts afford the agencies significant deference in determining the best data available for developing the RPAs. Therefore, even if this committee might have relied on different data or come to different conclusions than the agencies did, it does not follow that the RPAs are legally insufficient. Rather, this committee’s conclusions and recommendations should be seen as applying to future work beyond the scope of the agencies’ legal obligations.

Economic Considerations

Although the economic impact of species protections may be relevant under the ESA, its influence is limited. For example, economic concerns *may not* be part of the decision whether or not to list species as endangered or threatened, but *must be* considered when the agencies designate critical habitat (16 U.S.C. § 1533). When developing biological opinions and RPAs, the Ninth Circuit acknowledged that the wildlife agencies may go beyond “apolitical considerations” and that if two proposed RPAs would avoid jeopardy to the relevant species, the agencies “must be permitted to choose the one that best suits all of its interests, including political or business interests.” *Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515 (9th Cir. 1998); *See also* *Bennett v. Spear*, 520 U.S. 154 (1997) (asserting that the “best scientific and commercial data” provision is . . . intended, at least in part, to prevent uneconomic [because erroneous] jeopardy determinations”). Nevertheless, the lower courts have been reluctant to second-guess agency opinions on the basis of economic arguments (*Aluminum Co.* cited above).

Effects of the Proposed Action and the Environmental Baseline

In preparing biological opinions, agencies must evaluate the “effects of the [proposed] action” on the species or its critical habitat. Other adverse modifications of the species’ habitats or negative effects on their populations are considered part of the “environmental baseline.” The agencies’ analysis includes consideration of:

- 1) direct effects;
- 2) indirect effects (“those that are caused by the proposed action and are later in time, but still are reasonably certain to occur”);
- 3) interrelated actions (“those that are part of a larger action and depend on the larger action for their justification”);
- 4) interdependent actions (“those that have no independent utility apart from the action under consideration”); and
- 5) cumulative effects (“those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation”) (50 C.F.R. §§ 402.02 and 402.14(g)(3-4)).

STANDARDS FOR THE PREPARATION OF REASONABLE AND PRUDENT ALTERNATIVES (RPAs)

Although RPAs are not binding on the action agency, adherence to the RPAs provides the agency with a safe harbor from claimed violations of the ESA. As the U.S. Supreme Court explained, “the action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril (and that of its employees), for ‘any person’ who knowingly ‘takes’ an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment” (*Bennett v. Spear*, 520 U.S. 154 (1997)).

Under agency regulations, the RPAs must satisfy each of the following four requirements:

- 1) Project purpose: RPAs must be capable of implementation in a manner consistent with the intended purpose of the action.
- 2) Scope of agency authority: RPAs must be consistent with the scope of the action agencies' legal authority and jurisdiction.
- 3) Feasibility: RPAs must be economically and technologically feasible; and
- 4) Avoid jeopardy: The directors of FWS and NMFS must believe that the RPAs would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat (50 C.F.R. § 402.02).

Although RPAs must avoid the likelihood of jeopardy, they are not required to promote recovery of the affected species. In other words, no RPA has the responsibility of mitigating all the adverse effects—the “environmental baseline”—that may be causing the decline of a listed species. They must only avoid the likelihood that the *proposed action* will cause jeopardy.

3

The Life Histories of The Fishes

INTRODUCTION

Chinook salmon (*Oncorhynchus tshawytscha*), steelhead (*O. mykiss*), and green sturgeon (*Acipenser medirostris*) are anadromous species; that is, they spawn in freshwater but spend a portion of their life in saltwater. Delta smelt (*Hypomesus transpacificus*) are resident within the brackish and freshwater habitats of the delta. In both anadromous and resident life-history strategies the fish migrate from their natal habitat into their adult habitat and then back to the spawning habitat, completing the life cycle. The fish do not simply drift between their habitats, but have evolved specific life-stage behaviors to meet the challenges they confront. These behaviors are cued by the fishes' physiology and by environmental conditions, which together drive the timing and movement of the individuals through their life cycle. Because all species spend time in the delta, they share some environmental conditions and challenges, but their different life histories cause them also to face unique challenges. Many of the challenges are the result of anthropogenic modifications to the delta and river habitats, and these challenges are of particular concern (see Chapter 5). Some, but not all, of them are addressed in the RPAs. The information on the fishes' life histories presented below illustrates the complexity of their interactions with their environments and the potential importance of apparently small changes in the timing, direction, and magnitude of variations in flow, salinity, turbidity, water temperature, and other environmental conditions.

FISHES OF THE SALMON FAMILY

The delta provides habitat for two species of Pacific salmon, Chinook salmon (hereafter "salmon") and the rainbow trout-steelhead complex. Pacific salmon typically are anadromous. There are many exceptions, however, such as rainbow trout, which although apparently genetically identical to steelhead, are not anadromous; and there is a great deal of variation in their life histories (Williams, 2006).

When adult salmon, steelhead, and sturgeon return from the ocean and begin their upriver migration, they experience several challenges, including physical and water-quality blockages. Here the delta water system has had a great impact on populations, for 80% of the historical spawning habitat for Chinook salmon (Clark, 1929) and much of it for the other species has been blocked by the storage reservoirs of the Central Valley (Lindley et al., 2006). Summer temperatures in the Central Valley waterways can reach potentially lethal levels for salmon, increasing their susceptibility to disease and decreasing metabolic efficiency (Myrick and Cech, 2001, 2004). The timing of adult salmon runs leads them to avoid most of the detrimental effects of high summer temperatures because they enter the delta and swim upriver to their spawning habitats and hatcheries in the spring, autumn, and winter. Wild spawning fish excavate redds in

stream reaches with loose gravel in shallow riffles or along the margins of deeper runs (NMFS 2009), where temperatures are cooler and eggs buried in the gravel receive a sufficient flux of oxygenated water through interstitial flow. The eggs incubate for several months and after emerging the young fry either immediately begin their migration back to the ocean or spend several weeks to a year in freshwater before migrating. Because of this diversity, juvenile salmon and steelhead pass through the delta throughout the year; however, the timing and size of the migrants generally corresponds to specific runs (Williams, 2006, Lindley et al., 2006).

Salmon and steelhead undergo a complex set of physiological changes in preparation for their migration to the ocean known as "smoltification," after which the young fish are known as "smolts." The alteration of the fish's physiology to successfully osmoregulate in saltwater after beginning life in freshwater is a significant challenge that can be exacerbated by human-caused environmental changes (e.g., NRC, 2004b). Most Central Valley Chinook salmon migrate to the ocean within a few months of hatching and the smolts are less than 10 cm long, although some remain in freshwater for up to a year. Juvenile steelhead migrate to sea after one to three years in freshwater, and can be as large as 25 cm in length. Young migrating Chinook are much more vulnerable to entrainment in adverse flows than the stronger-swimming steelhead smolts.

Juvenile salmon migrants experience predation during their downstream migration through the Sacramento River or through the interior delta on their way to the sea. Fish that enter the central delta, driven by the strong tidal and pumping-induced flows, are moved through a labyrinth of channels, which further delays their migration and exposes them to additional predators (Perry et al., 2010). Finally, fish that enter the Old and Middle Rivers (OMR) can be drawn towards the SWP and CVP pumps (Kimmerer, 2008a). Juvenile salmon that successfully pass through the delta enter the ocean and spend one or more years there before returning to freshwater to spawn. Ocean survival is particularly dependent on the conditions the fish experience during the first few months they enter the saltwater (Lindley et al., 2009). Fish that are drawn into the central and southern delta by reverse flows are more vulnerable to predation than those that take a more direct path to the ocean, and other aspects of changed environmental conditions also expose them to predators (for more detail, see Chapter 5).

GREEN STURGEON

The Central Valley green sturgeon (*Acipenser medirostris*) is an anadromous fish that can reach 270 cm (nearly nine feet) in length with a maximum age of 60 to 70 years (Moyle et al. 2002). The historical distribution of green sturgeon is poorly documented, but they may have been distributed above the locations of present-day dams on the Sacramento and Feather Rivers (Beamesderfer et al., 2007). Information on the distribution of green sturgeon in the San Joaquin River is lacking. Mature green sturgeon enter the Sacramento River from the ocean in March and April. The Red Bluff Diversion Dam can impede their migrations (Heublein et al. 2009). After spawning, green sturgeon may immediately leave the river or hold over in deep pools until the onset of winter rains (Erikson et al., 2002, Heublein et al., 2009). Individuals then migrate back to the ocean and return to freshwater to spawn every two to four years (Erickson and Webb, 2007, Lindley et al., 2008).

Based on adult spawning behavior and the habitats required for green sturgeon embryo development, reproductive females likely select spawning areas with turbulent, high velocities near low-velocity resting areas. Green sturgeon spawning areas are presumed to be characterized by

coarser substrates upstream of lower gradient reaches, which usually have slower velocities. Eggs and milt are released in turbulent water above deep, complex habitats; fertilized eggs drift into deeper areas and stick onto the substrate. Eggs require cool temperatures for development and hatch after approximately a week. Larval and juvenile green sturgeons are bottom-oriented and nocturnally active until a few months of age (Kynard et al., 2005). Juvenile green sturgeon migrate into seawater portions of natal estuaries as early as one and a half years old (Allen and Cech, 2007), and eventually emigrate to nearshore coastal waters by three years old. Subadults are migratory, spending their next 12 to 16 years foraging in the coastal ocean and entering western estuaries during the summer (Moser and Lindley, 2007). In the ocean, green sturgeon inhabit the coastal shelf out to 100m depth with occasional, rapid vertical ascents near or to the surface (Erickson and Hightower, 2007).

DELTA SMELT

The delta smelt is a near-annual species; most individuals complete their life cycle in one year, but some survive for two years and reproduce again. Delta smelt reside in brackish waters around the western delta and Suisun Bay region of the estuary, being commonly found in salinities of 2 to 7, but the range they occupy extends from 0 (freshwater) to 15 or more (Moyle, 2002). In the winter (December to April), pre-spawning delta smelt migrate to tidal freshwater habitats for spawning, and larvae rear in these areas before emigrating down to the brackish water (Bennett, 2005). Delta smelt inhabit open waters away from the bottom and shore-associated structural features. Although delta smelt spawning has never been observed in the wild, information about related members of the smelt family suggests that delta smelt use bottom substrate and nearshore features during spawning. Juvenile and adult stages, 20-70 mm in length, are generally caught in the western delta and Suisun Bay in the landward margin of the brackish salinity zone, which may extend upstream of the confluence zone of the Sacramento and San Joaquin Rivers. Historically pre- and post-spawned fish were observed throughout the delta. In wet years, spawning adults often were observed in the channels and sloughs in Suisun Marsh and the lower Napa River.

In the brackish habitat of the western delta the flow is tidal with a net seaward movement, and so to maintain position, the juvenile fish appear to coordinate swimming behavior with the tides, occurring near the surface on the flood tides and at depth on the ebbs. However, in other regions, adaptive tidal behavior has not been observed and fish simply move with the tides, which may promote horizontal exchange to adjacent shallow water habitats. The FWS biological opinion emphasizes the complexity of this behavior (p. 651) and thus the above description is a general one that does not capture details that might be important.

The brackish zone also has higher densities of other fishes and zooplankton, suggesting that it may serve as a nursery habitat for delta smelt and other fishes (Bennett 2005). The spawning movement of adults from their brackish habitat in the western delta landward to the freshwater portions of the delta is triggered by high flows and turbidity pulses.

This diversity of paths from the low-salinity (brackish) zone to the freshwater spawning habitats suggests that delta smelt do not have fidelity to specific structural habitats as do salmon. Instead, their upstream movement is directed by a combination of physiological and environmental cues that involve salinity, turbidity, and both net and tidal flows through the channels of the delta and its tributaries. Additionally, since 2005, approximately 42% of the current delta smelt popu-

lation is in the Cache Slough complex north of the delta, and may represent an alternative life-history strategy in which the fish remain upstream through maturity (Sommer et al., 2009).

Historically, the complete delta-smelt life cycle occurred unobstructed throughout the delta. Human-caused changes in delta water quality and hydrodynamics have disrupted the cycle and since 2005, delta-smelt population densities have been extremely low in the traditional habitats in the central and south delta (www.dfg.ca.gov/delta/data/), and pump salvage⁵ also has been extremely low, about 4% of the 50-year average index (www.dfg.ca.gov/delta/data/townet/indices.asp?species=3). Analyses seeking causes for the declines to the present condition have focused on relationships between abundance, salvage, water exports, delta flows, turbidity, and food. Kimmerer (2008b) found that delta-smelt survival between summer (juvenile) and fall (adult) was related to zooplankton biomass, suggesting that high zooplankton abundances contributed to delta-smelt abundance and residence time in the southern delta, and thus increased entrainment risk at the pumps. Grimaldo et al. (2009) found that between 1995 and 2005 the inter-annual variation in adult delta-smelt salvage was best correlated with turbidity and the interaction of OMR⁶ flows and X2⁷. The annual salvage of age-0 delta smelt (fish hatched in that year, around 27 mm in length) was best correlated with spring abundance of zooplankton, OMR flows, and turbidity. Additionally, Grimaldo et al. suggested that differences in temporal patterns of entrainment of delta smelt between years may be a measure of the degree to which their physical habitat overlapped with the hydrodynamic footprint of negative OMR flows towards the pumps. However, the year-class strength of adult delta smelt was not related to salvage, although the position of X2 was correlated with salvage at an intra-annual scale when OMR flows were negative. Other analyses showed a similar correlation (e.g., FWS, 2008).

While the correlation between OMR flows and salvage is substantial (Kimmerer, 2008b), their effect on population dynamics is not clear (Bennett, 2005; Grimaldo et al., 2009). Indirect factors could have contributed to population declines through a reduction in the size and abundance of food in the brackish zone. Overall zooplankton abundance is correlated with delta smelt survival (Feyrer et al., 2007; Kimmerer, 2008b; Grimaldo et al., 2009). Zooplankton abundance has been reduced through several factors, including the introduction of the overbite clam (*Corbula amurensis*), an efficient grazer of zooplankton in the low-salinity zone, and changes in nutrients that have altered the phytoplankton population so that cyanobacteria, which can reduce the food supply for zooplankton, have increased while diatoms have declined (FWS, 2008). The change in zooplankton species, associated with the success of invasive species in changed environmental conditions, also is probably important. It has been suggested that the position of X2 affects the size of delta smelt habitat and thus it affects the susceptibility of juvenile and adult delta smelt to pump entrainment (Feyrer et al., 2007; Kimmerer, 2008a). Furthermore, the mean position of X2 has moved inland about 10 km over the past 15 years (FWS 2008, p. 180). However, there is no direct evidence relating these indirect effects to population numbers of smelt

⁵ "Salvage" refers to fish caught in the pumps and retrieved alive to be released elsewhere in the system. It often is used as a surrogate estimate for "take" by the pumps.

⁶ The term "OMR flows" refers to flows in the Old and Middle Rivers (see Figure 1-1), which are affected by the pumping of water for export. At high negative flows, that is, flows away from the sea towards the pumps in the south, the normal seaward flow associated with ebb tides can be completely eliminated.

⁷ "X2" refers to the salinity isohaline of salinity 2 (a contour line of equal salinity). Sometimes X2 is used as shorthand for the mean position of that isohaline, measured in kilometers upstream from the Golden Gate Bridge over the outlet of San Francisco Bay. Managing the position of X2 is a major aspect of the delta smelt Biological Opinion and RPA; it is managed by adjusting flows of fresh water from delta reservoirs, as well as by adjusting pumping rates.

(Kimmerer, 2002; Bennett, 2005). In addition, delta smelt are now largely absent from the central and southern delta, while a significant portion of the remaining population exists in the Cache Slough complex to the north. These changes increase the uncertainty surrounding current estimates of delta smelt population changes in response to alterations in delta hydraulics.

4

Use of Models

MODELING SCENARIOS

Modeling of baselines and future project actions is a standard practice of evaluating impacts. Both biological opinions relied on the use of modeling scenarios (known as Studies) provided by the Operations Criteria and Plan (OCAP) biological assessment (BA) (http://www.usbr.gov/mp/cvo/ocap_page.html), although the extent to which such results were used in each biological opinion and in the formulation of RPAs varied significantly. The “proposed action” with reference to ESA is the continued operation of the CVP and SWP with additional operational and structural changes (Table 2-1 of USBR, 2008) to the system. The U.S. Bureau of Reclamation (USBR) and the California Department of Water Resources (DWR) provided the results of the modeling conducted for simulating baseline conditions, future system components, operational strategies, and the water supply demands. In addition to simulating the water-supply deliveries of the project, the modeling also attempted to mimic the project operations associated with the regulatory environments described in operating criteria described in D-1485, D-1641, CVPIA Section 3406 (b)(2) and the Environmental Water Account (EWA) (USBR 2008). A major difference in the current and future scenarios is the extent to which EWA is used. The purpose of EWA was to enable diversion of water by the SWP and CVP from the delta to be reduced at times to benefit fish species while minimizing uncompensated loss of water to SWP and CVP contractors (USBR, 2008, Chapter 2). The EWA is intended to replace the water loss due to pumping curtailments by purchasing surface water and groundwater from willing sellers and through increasing the flexibility of operations. The simulations include both a “full EWA” characterizing the full use of EWA assets as well as a “limited EWA” focusing only on a limited number of assets. The EWA is currently under review to determine its future (FWS 2008 p. 34) and the RPA actions were not based on it.

Another factor that changed from current to future conditions is the way water demand by CVP/SWP users is simulated. Demands have been pre-processed using either contractual amounts and/or level of development (existing versus future). Some demands were assumed to be fixed at contractual amounts whereas in other cases they varied according to the hydrologic conditions. This topic will be considered in the committee’s second report.

While several study scenarios were developed for the OCAP biological assessment (USBR, 2008), the use of modeling results in the biological opinions was largely limited to a smaller set of scenarios (Table 4-1).

Study 7.0 describes the existing condition (circa 2005), whereas Study 7.1 presents the existing condition demands with near future facilities as well as the projected modification to EWA. Study 8 describes the future condition corresponding to the year 2030 (USBR, 2008, pp. 9-33, 9-53, 9-54). Study series 9 constitutes a future condition representing modified hydrology (warm and warmer, dry and wet) along with a projected sea level rise of one foot.

TABLE 4-1 Key scenarios used for biological opinions of FWS and NMFS

Study	Level of Development (Year)	Environmental Water Account (EWA)	Future project facilities ¹	Climate and Sea Level Rise
7.0	2005	Full EWA	No	No
7.1	2005	Limited EWA	Yes	No
8.0	2030	Limited EWA	Yes	No
9.0-9.5	2030	Same as in Study 8.0 ²	Yes	Yes

¹Future project features include South Delta Improvement Program (Stage 1), Freeport Regional Water Project, California Aqueduct and Delta-Mendota Canal intertie

²According to the OCAP BA (USBR, 2008), Study suite 9 is identical to Study 8.0 except for climate change and sea-level rise

CENTRAL ISSUES CONCERNING MODEL USE IN THE BIOLOGICAL OPINIONS

The USFWS and NMFS supplemented the modeling results provided by USBR and DWR with their own modeling efforts and available science on the implications of management actions on species. The primary suite of models provided to FWS and NMFS include (Chapter 9, OCAP-BA):

- (a) Operations and hydrodynamic models: CalSim-II, CalLite, the Delta Simulation Model II {DSM2}, including particle-tracking models (PTMs, which also are considered as surrogates for biological models)
- (b) Temperature models: Reclamation Temperature, SRWQM, and Feather River Mode
- (c) Biological models: Reclamation Mortality, and SALMOD

The modeling framework used by the agencies is diagrammed in Figure 4-1.

The USFWS, in its biological opinion, used available results from a combination of tools and data sources, including CalSim-II, DSM2-PTM, DAYFLOW historical flows, and statistical models based on observational data and particle-tracking simulations (FWS 2008 pg-204). NMFS analyses included results from coupled CalSim-II simulations with various water-quality and biological models for a few of the life stages (NMFS, 2009, page 64).

The CalSim-II model, the primary tool used to evaluate the water-resources implication of the proposed actions, was developed by the DWR and the USBR to simulate water storage and supply, streamflows, and delta export capability for the Central Valley Project (CVP) and the State Water Project (SWP). CalSim-II simulates water deliveries and the regulatory environment associated with the water-resources system north of the delta and south of the delta using a single time step (one month) optimization procedure based on a linear programming algorithm. CalSim-II represents the best available planning model for the CVP-SWP system, according to a CALFED Science Program peer review by Close et al. (2003) (USDI-USBR, 2008, p. 9-4). However, many users have suggested that its primary limitation is its monthly time step, and the model should be used primarily for comparative analysis between scenarios and discouraged its use for absolute predictions (Ferreira et al., 2005; USBR, 2008, Chapter 9). In response to the

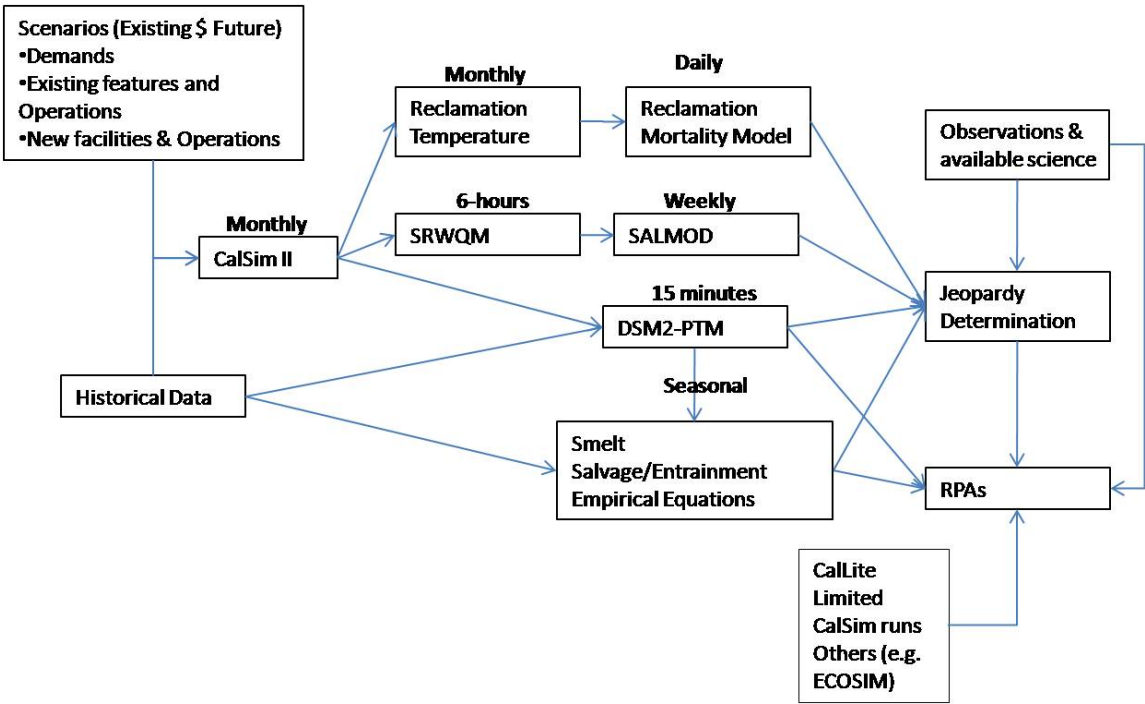


FIGURE 4-1 Modeling framework used in NMFS and USFWS biological opinions and RPAs.

peer review by Close et al. (2003), DWR and USBR provided a list of development priorities (Table 2, DWR/USBR, 2004), including the use of a daily time step, but it is not clear how many of such planned improvements have been incorporated into the version of CalSim-II used in the biological opinions.

Several other tools and models were central in effects analysis and developing RPAs, including hydrodynamic and water-quality (DSM2, USBR's temperature, SRWQM), habitat (SALMOD), and statistical and particle-tracking models (salvage, DSM2-PTM). Some of these models have already been evaluated in the literature for their individual strengths and limitations, though some (SALMOD and USBR's mortality models) have not yet been formally peer reviewed. We first review some of the challenges of applying these individual models in the determination of RPAs, and then focus on examining the modeling process, including how the models contributed to the development of RPAs, and where the uncertainties and vulnerabilities in that process lie.

Model Scale and Management Implications

Very generally, the tiered modeling approach (Figure 4-1) applied the results of CalSim-II as input to various hydrodynamic and ecological models to predict impacts of project operations and, to a very limited extent, to explore RPAs. At one level, model simulations were also used or performed to investigate the feasibility of some proposed actions. For example, CalSim-II was used at the planning level to investigate whether the USBR could meet the 1.9MAF (at the end of

September) required by actions I.2.3 and I.2.4 (maintaining cold water supplies necessary for egg incubation for the following summer's cohort of winter-run), and to recommend storage conservation in severe and extended droughts (NMFS, 2009, page 596). Similarly, examination of CalSim results and hydrologic records demonstrated to the agencies that the first year of a drought sequence is particularly critical to storage and operations in the following drought year (NMFS 2009 page 596). The benefits of using models at this planning level, especially given the importance of water-year types, is clear, and there is little controversy about this application of the models.

At another level, model scenarios were examined to investigate the relationships between operations and impacts on various life stages of the fish across the water-year types and operations scenarios. For example, NMFS used DWR's Delta Survival Model (Greene, 2008) to estimate mortality of smolts associated with three CalSim-II Study scenarios (7.0, 7.1, 8.0). The USFWS used statistical models of salvage and total entrainment (Kimmerer, 2008; Grimaldo et al., 2009) to investigate the effects of proposed operations by comparing actual and predicted salvage and entrainment losses under modeled OMR flows (FWS, 2008, page 211).

While some challenges exist in linking models in this tiered approach (see next section), concerns and controversies appear to be largely directed at the various forms of statistical relationships of salvage versus OMR flows, extrapolation of these relationships that describe impacts on single life stages to assess the population impacts on species, and the use of biological models without full consideration of their underlying uncertainties. In particular, this nested sequence of statistical models does not allow for uncertainties at one step to influence predictions at the next step. As a result, some of the RPA actions, especially those involving X2 and OMR flow triggers, are based on less reliable scientific and modeling foundations than others. In these cases, the incomplete data and resolution of the models do not closely match the resolution of the actions.

Adequacy of Current Models

Life-cycle models

Both agencies have been criticized for the lack of adequate life-cycle models to address population level responses (e.g., Deriso, 2009; Hilborn, 2009; Manly, 2009). Nonlinear and compensatory relationships between different life-history stages are common in many fish species. Moreover, many life-history traits exhibit significant patterns of autocorrelation, such that changes in one life-history trait induce or cause related changes in others. These patterns can most effectively be understood through integrated analyses conducted in a modeling framework that represents the complete life cycle. However, complete life-cycle models were not used in either biological opinion to evaluate the effects of changes in operations. The agencies acknowledge that further model development is required, including the "cooperative development of a salmonid life-cycle model acceptable to NMFS, Reclamation [USBR], CDFG, and DWR" (NMSF biological opinion, page 584). While one life-cycle model (Interactive Object-Oriented Salmon simulation) was available for winter-run salmon from the OCAP BA (USBR, 2008), this model was rejected based on model resolution and data limitation issues (NMFS, 2009, page 65). Similarly, a better life-cycle model for delta smelt is critically needed (PBS&J 2008). Such life-cycle models for delta smelt are currently under development. The committee recommends that

development of such models be given a high priority within the agencies. The committee also encourages the agencies to develop several different modeling approaches to enable the results of models with different structure and assumptions to be compared. When multiple models agree, the confidence in their predictions is increased.

Particle-Tracking Models (PTMs)

Particle-tracking models (PTMs) are models that treat eggs and larval fishes as if they were particles and simulate their movements based on hydraulic models of flows. Criticisms have applied to the use of PTMs, which rely on some key assumptions (e.g., neutral buoyancy, no active swimming) that have been challenged at least for some life stages (Kimmerer and Nobriga, 2008) on the basis that fish live and move in three dimensions. Other limitations of the use of PTMs in this case include the reliance on the one-dimensional DSM2, use of random-walks to simulate lateral movements, and the lack of simulation of fish behavior. In view of these limitations, PTMs as used in this case may not be suitable for predicting the movement of fish of some life stages (juvenile and adults) where behavior becomes relevant to the question of potential entrainment (Kimmerer and Nobriga, 2008). The NMFS acknowledges these limitations, noting that "The acoustic tagging studies also indicate that fish behavior is complex, with fish exhibiting behavior that is not captured by the 'tidal surfing' model utilized as one of the options in the PTM simulations. Fish made their way downstream in a way that was more complicated than simply riding the tide, and no discernable phase of the tide had greater net downstream movement than another" (NMFS, 2009, page 651).

However, while fish seldom behave like passive particles, results based on passive particles can provide insights. For example, the NMFS used a combination of models to simulate mortality rates of salmonids for three CalSim-II scenarios. The results were used to compare the inter- and intra-annual impacts of the three scenarios (NMFS, 2009, page 381). Further, the agencies advocate improving the model through further study, such as Action iV.2.2, which includes an acoustic tag experiment in part to evaluate action benefits and in part to improve PTM results (USBR, 2008, page 645). Thus, while there is uncertainty regarding the accuracy of the mortality losses, the use of the models in a comparative way is probably acceptable. However, it should be made clear how the model is used, and the explicit consideration of the PTM assumptions and uncertainties should be more clearly documented in the biological opinions.

Although there has not been an assessment of the degree to which these limitations affect the conclusions, PTM results were used for RPA development. Although the DSM2 has been calibrated adequately for OMR flows, there is no clear evidence concerning the accuracy of the PTM's ability to simulate smelt entrainment in relation to how the models are used for jeopardy determination and RPA development. This is particularly important because a number of actions driven by the RPAs recommend trigger values for OMR to curtail exports. As discussed in a later section, the science surrounding these OMR triggers is less clear than for many other aspects of the RPAs, and this trigger may result in significant water requirements. The committee's recommendations for improving the modeling and associated science are intended to improve the best science available to the agencies. The committee will address such improvements in greater detail in its second report.

Other Biological Models

The NMFS used other biological models to simulate the effects of operations on various life stages of salmon. These models involve several key assumptions and data limitations that influence the reliability of their results.

For example, SALMOD, developed by the USGS, was used by the NMFS to investigate the population level responses of the freshwater life stages to habitat changes caused by project operations (NMFS, 2009, page 269). A variety of weekly averaged inputs are required, including streamflow, water temperature, and number and distribution of adult spawners (USBR, 2008, page 9-25). This model provides some valuable insight, but requires greater consideration of the model assumptions (e.g., linear stream, habitat as primary limiting factor, independence of food resources on flow and temperature, density independence for some life stages) and uncertainties. Otherwise, the use of this model is limited to comparative, rather than absolute, analysis of RPA actions. Further, it would be important to investigate the sensitivity of the model to initial conditions and input data, particularly those prone to measurement error (e.g., number and distribution of spawners) to provide some indication of the reliability of model outputs. While SALMOD has not been thoroughly peer-reviewed, criticisms of similar modeling approaches (e.g., NRC, 2008) have highlighted some key issues with habitat-suitability models (e.g., the need for greater clarity concerning the assumption that habitat is a limiting factor and the need for a thorough assessment of the representativeness of the areas sampled) and have provided extensive discussions of the use of models in an adaptive-management approach, which is relevant to this committee's recommendations. Finally, the NMFS acknowledges that SALMOD is most appropriately applied to large populations that are not sensitive to individual variability and environmental stochasticity (NMFS 2009 page 270), which means that the predictions for the relatively small population in the delta river system are subject to considerable uncertainty. The uncertainties again highlight the need for an adaptive management approach.

The NMFS also used results from the USBR's salmon mortality model (Hydrologic Consultants, Inc., 1996) to examine daily salmon spawning losses for early life stages (pre-spawned eggs, fertilized eggs, and pre-emergent fry) due to exposure of high temperatures. Temperature-exposure mortality criteria for the three life stages are combined with modeled temperature predictions and spawning distribution data to compute percents of salmon spawning losses. Because simulations of river temperatures are run on a daily or shorter time step, downscaling of monthly CalSim-II data is required (Attachment H-1, USBR, 2008). Moreover, the monthly temperature models do not adequately capture the range of daily temperature variability (page 9-109, USBR 2008). In addition, several assumptions (e.g., density independence) and important data limitations (USBR, 2008, page L-6, L-7) challenge the reliability of this model. Finally, while this model has been applied in other systems, it is not thoroughly peer reviewed and no analysis of sensitivity or uncertainty has been performed. Addressing these model shortcomings would help increase confidence in the analyses.

Developing, Evaluating, and Applying Best Available Models

As the agencies work within the constraints of best available science, some recognition of the adequacy and reliability of the models should be reflected in the management decisions by making them adaptive. The following five factors, in particular, need better documentation.

1. Incompatible temporal resolution and implications for management decisions.

The individual models used in this tiered analysis approach have a broad range of temporal resolutions (Figure 4-1). Care must be exercised in such situations so that the linkages of models with different temporal and spatial resolutions do not result in propagation of large errors that may influence decisions derived from the modeling results. For example, CalSim-II uses a monthly time step whereas the DSM2 uses a 15-minute time step. Although the tidal boundary condition in DSM2 is pre-processed at 15-minutes, average monthly flow, simulated by CalSim-II, is provided as the upstream flow boundary condition at many delta inflow points. The linkage of CalSim-II and DSM2 attempts to smooth out the step change in monthly simulated flows (USBR, 2008, pages 9-14, 9-15), but this is not necessarily adequate to simulate the fluctuations of flows within the month. The use of the monthly time step certainly could have a significant influence on such performance measures as OMR flows, particularly when such flows are recommended in RPAs for triggering export curtailments. USFWS and NMFS should provide a comparison of daily versus monthly average simulations of DSM2 for a historical period to ascertain the reliability of using monthly CalSim output as input to DSM2.

The incompatibility of temporal resolutions is particularly important given that flows in the delta are strongly influenced by tides. The flows at such locations as Old River and Middle River are characterized by two flood-ebb cycles per day, with positive and negative values of much larger magnitude than the average net flow at these locations (Gartrell, 2010). In view of the fact that OMR flows have sub-hourly hydrodynamic components, averaging over a longer period such as 5 to 14 days to define the thresholds in the implementation of the RPAs could produce unnecessary changes in water exports. The use of monthly average flows produced by CalSim-II could further add to the concerns regarding the recommended thresholds of OMR flows. In view of these modeling uncertainties, further clarification as to how the modeled OMR flows were used for jeopardy determination and hence for the development and implementation of RPAs is needed.

2. Inconsistent use of baselines.

Both biological opinions use historical data along with modeling results of the CALSIM-II scenarios. Study 7.0, which represents the existing condition, is expected to be closest to historical conditions. However, important differences between the two (historical and existing conditions) could exist due to differences in demands and more importantly due to deviations in operations. Because of the simplifying assumptions used in CalSim-II historical simulations, the FWS BO opted to use actual historical data to develop their baseline (FWS, 2008, page 206) and continued to compare historical data with the modeling results of the numerous scenarios described above (see, for example, Figures E-3 through E-19).

The results suggest that often, actual data are very different in magnitude in comparison to Study 7.0 and furthermore, most scenarios (Studies 7, 7.1, 8, and study series 9) are clumped together with relatively small differences between them in relation to the magnitude of differences with the historical data. In view of these differences, the validation of Study 7.0 and consequently others, becomes even more important for the purpose of RPA development.

The use of historical data to make inferences is very typical and appropriate in the biological opinions. However, since the evaluation of project actions and the development of RPAs are based on the evaluation of modeling scenarios, which appear to greatly differ from historical

data, a comparison of the two sets of data (historical and simulated) may incur errors in interpretation. The committee recommends that the biological opinions provide a better justification for the reasonableness of the baseline scenario, Study 7.0, as well as the comparison of scenario results with historical data.

3. *Challenges in calibrating and validating any of the models to historical observations and operations.*

It is a standard practice to ensure the appropriate use of models through the processes of calibration and testing (ASTM, 2008; NRC 2008). Validation of CalSim-II is described in Appendix U of the OCAP BA (USBR, 2008), which provides a comparison of Study 7.0 (existing condition) with the recent historical data. A review of those results shows that there are significant deviations of the historical data from the simulated storages and exports that may be of the same magnitude as the differences between the scenarios being evaluated. Thus, while the tool itself performs well, some questions remain regarding the gross nature of generalized rules used in CalSim-II to operate CVP and SWP systems, relative to actual variability of dynamic operations (USBR, 2008, pages 9-4). In their peer review of the CalSim-II model, Close et al. (2003) suggested that "Given present and anticipated uses of CalSim-II, the model should be calibrated, tested, and documented for "absolute" or non-comparative uses." It is not clear if the agencies that developed the model have responded to this suggestion in a comprehensive manner. As emphasized above, a clear presentation of the realism of Study 7.0 with respect to recent operations or observations would help avoid the criticism as to the results of Study 7.0 as well as other derivatives of it (Studies 7.1, 8.0 and series 9).

The OCAP BA (USBR, 2008) provides sufficient information on the calibration and testing of temperature models, and the time steps vary among models, although all used the monthly output of CalSim-II in predictions. Thus, they appear to be adequate for predicting temperature variation and making comparisons at the monthly time scale. Information on the calibration of DSM2 and PTM is provided in part by DWR, which has been posted online (<http://modeling.water.ca.gov/delta/studies/validation2000/>) results of the calibration of this 1-D, hydrodynamic model of the delta. Based on the information provided, it appears to adequately mimic the historical data at a daily time-scale. However, the DSM2 simulations should demonstrate that the range of negative OMR flows used for calibration covers the high negative flows simulated by CalSim-II for future scenarios. There has been an attempt to test PTM (Wilbur, 2001), but clearly this tool needs further improvements. Wilbur (2001) reports that the existing velocity profiles used in PTM consistently over-predict the field observations (i.e., the predicted velocities exceed the observed velocities).

In addition, with the potential for changes in the historical patterns of climate and hydrology, calibrating models with historical data alone may be less meaningful for projection of future operations. Thus, in addition to providing support for model improvement and adaptive management, a more robust monitoring program will also support calibration and testing of models with more relevant representation of the current and future system. For example, drought-induced low flows of the past several years provide opportunities to calibrate and test models under infrequent but foreseeable conditions. Realistic modeling of the system that incorporates what actually happens in an operational setting with climate outlook will be important in the future.

The biological models such as USBR's mortality model and SALMOD are essentially uncalibrated for the system, and further concerns about these models were addressed in previous sections.

4. Challenges of the Tiered Modeling Approach.

Temperature, OMR flows, and X2 performance measures are particularly challenged by the tiered modeling approach, with limitations related to data availability and inconsistency in model resolution (spatial and temporal) and complexity (USBR, 2008, page 9-31). However, the use of models may still be beneficial in planning and triggering adaptive management needs. For example, for NMFS implementation of Action II.2 (Lower American River Temperature Management), forecasts will be used to simulate operations and compliance with thermal criteria for specific life stages in months when salmon would be present (NMFS, 2009, page 614). However, if the USBR determines that it cannot meet the temperature requirement, and can demonstrate this through modeling of allocations and delivery schedules, consultation with the NMFS will occur. In this example, modeling results are used to evaluate the feasibility of meeting criteria, rather than trying to derive direct loss estimates. The RPA then leads to a process for adaptive management of the temperature operations based on updates to the hydrologic information. Thus, despite the particularly challenging example of managing temperature, the use of models appears to have allowed for flexibility.

However, no qualitative or quantitative analysis of the magnitude of errors across these model linkages and the resulting uncertainties are presented. While not required for the justification of RPAs, failing to consider error propagation across the models makes it difficult to evaluate the reliability of meeting the RPAs and their ability to provide the intended benefits.

5. Lack of an integrative analysis of RPAs

Numerous RPA actions proposed in both biological opinions cover new projects as well as operational changes. However, the information provided to the committee did not include a comprehensive analysis of all RPA actions, either individually or, more important, jointly, with respect to their ability to reduce the risks to the fish or to estimate system-wide water requirements. Clearly, the agencies lacked properly linked operations/hydrodynamic/biological models at the appropriate scales for RPA development. The agencies should be complimented for using historical data as well as best available science when modeling was not adequate. However, the proposed RPAs could incur significant water supply costs, and there should be an attempt to provide an integrative analysis of the RPAs with quantitative tools. The committee also acknowledges the challenges associated with estimating water requirements for some RPAs, particularly those based on adaptive management strategies, but explicit and transparent consideration of water requirements and biological benefits of specific actions and of subsets of actions would provide the basis for a smoother implementation of the RPAs.

The committee recommends that the agencies consider investigating the use of CalSim-II and other quantitative tools (e.g., PTM, life-cycle models) to simulate appropriate RPA actions of both biological opinions. These linked models would allow an integrated evaluation of the biological benefits and water requirements of individual actions and suites of actions, and the identification of potential species conflicts among the RPAs. Although not required by the ESA, such

an integrative analysis would be helpful to all concerned to evaluate the degree to which the RPAs are likely to produce biological benefits and to quantify the water requirements to those who might be affected by the future actions of the two biological opinions. In addition to further model development, efforts to improve documentation of model use would be beneficial. Documentation should include a record of the decisions, assumptions, and limitations of the models (e.g., NRC, 2008).

Thus, we find that, while used appropriately in this analysis, the PTM and biological models for both salmon and smelt should be further developed, evaluated, and documented. The models show promise for being quantitative tools that would allow for examination of alternative ideas about key relationships underlying the RPAs. In addition, complete life-cycle models capable of being linked to these other models should be developed. Although developing, testing, and evaluating such models would require a significant investment, the committee judges that the investment would be worthwhile in the long term.

CONCLUSION

Modeling is useful for understanding the system as well as predicting future performance. As long as modelers understand and accurately convey the uncertainties of models, they can provide valuable information for making decisions. The committee reviewed the models the agencies used to determine to what degree they used the models in developing the RPAs. The biological opinions have used results of a variety of operations, hydrodynamic, and biological models currently available to them for RPA development. However, the agencies have not developed a comprehensive modeling strategy that includes the development of new models (e.g., life-cycle and movement models that link behavior and hydrology); such models may have provided important additional information for the development of RPAs. Nonetheless, the agencies should be complimented for combining the available modeling results with historical observations and peer-reviewed literature. The committee also compliments the agencies for the extensive discussion and presentation of the rationale for the particular types of actions proposed in the RPAs.

The committee concluded that as far as they went, despite flaws, the individual models were scientifically justified, but that they needed improvements and that they did not go far enough toward an integrated analysis of the RPAs. The committee has raised several important issues related to the modeling process used, including the model scale and management information; the adequacy of models, particularly the particle-tracking model and the lack of life-cycle models; incompatibilities in both temporal and spatial scales among the models and between model output and the scale of the RPA actions; the use of baselines; inadequate calibration and testing of modeling tools (in some cases); and inadequate model documentation. A more-thorough, integrative evaluation of RPA actions with respect to their likelihood of reducing adverse effects on the listed fishes and their likely economic consequences, coupled with clear documentation would improve the credibility and perhaps the acceptance of the RPAs. Thus the committee concluded that improving the models by making them more realistic and by better matching the scale of their outputs to the scale of the actions, and by extending the modeling to be more comprehensive and to include features such as fish life cycles would improve the agencies' abilities to assess risks to the fishes, to fine-tune various actions, and to predict the effects of the actions. Three-dimensional models are more expensive and time-consuming than simpler models, but

they can contribute valuable understanding if used appropriately (e.g., Gross et al., 1999; Gross et al. 2009).

In addition, the committee concludes that opportunities exist for developing a framework to improve the credibility, accountability, and utility of models used in implementing the RPAs. The framework will be particularly important for some of the more-complex actions, such as those involving Shasta and San Joaquin storage and flows, which rely heavily on model predictions. The committee plans to address such issues, including the framework mentioned above, in more detail in its second report.

5

Other Stressors

INTRODUCTION

Declines in the listed species must be considered in the context of the many changes that are occurring in the “baseline” factors in the region. While the CVP and SWP pumps kill fish, no scientific study has demonstrated that pumping in the south delta is the most important or the only factor accounting for the delta-smelt population decline. Therefore, the multiple other stressors that are affecting fish in the delta environment as well as in the other environments they occupy during their lives must be considered, as well as their comparative importance with respect to the effects of export pumping. These factors and their impacts, only some of which originate within the delta itself, will be described in greater detail in the committee’s second report. Some are described here to highlight their potential importance and to underscore that a holistic approach to managing the ecology of imperiled fishes in the delta will be required if species declines are to be reversed. The factors described here are not meant to be exhaustive, but are intended to demonstrate that the effects of these factors are numerous and, in some cases, not only potentially very important but also under-characterized. Moreover, while individual relationships with these stress factors are generally weakly understood, the cumulative or interactive effects of these factors with each other and with water exports are virtually unknown and unexplored (Sommer et al., 2007).

CONTAMINANTS

It has long been recognized that contaminants are present in the delta, have had impacts on the fishes, and may be increasing (Linville et al., 2002; Davis et al., 2003; Edmunds et al., 1999). Contamination of runoff from agricultural use of pesticides has been documented and has been shown to affect invertebrates and other prey, as well as on some life stages of fish (e.g., Kuivila and Foe, 1995; Giddings, 2000; Weston et al., 2004). Kuivila and Moon (2004) found that larval and juvenile delta smelt coincide with elevated levels of pesticides in the spring. Pyrethroid insecticide use has increased in recent years. Such insecticides have been found in higher concentrations in runoff, and may be toxic to macroinvertebrates in the sediment (Weston et al., 2004, 2005); it is toxic to the amphipod *Hyaella azteca*, which is found in the delta (Weston and Lydy, 2010). The use of pyrethroids increased substantially in the recent years during which the decline of pelagic organisms in the delta became a serious concern as compared to earlier decades (Oros and Werner, 2005). Among other identified contaminants that may also have effects are selenium and mercury. Histopathological studies have shown a range of effects, from little to no effect

(Foott et al., 2006) to significant evidence of impairment depending on species, timing, and contaminant biomarker.

ALTERED NUTRIENT LOADS

Nutrients have received recent attention as a potential stress factor for phytoplankton, zooplankton, and fish populations for several reasons. First, research by Wilkerson et al. (2006) and Dugdale et al. (2007) found that phytoplankton (diatom) growth in mesocosm experiments did not occur under *in situ* ammonium levels, and only increased when ammonium levels were reduced. They interpreted this finding to mean that diatom growth was suppressed under ambient ammonium levels, and only after ammonium concentrations began to be drawn down did diatoms begin to use nitrate, an alternate nitrogen form, and then proliferate.

With respect to nutrient loading effects, declines in phosphate loading may be related to declines in chlorophyll-*a* throughout the Sacramento-San Joaquin delta (Van Nieuwenhuysse, 2007). While these results show that chlorophyll-*a* in the water column declined coincident with the decline in phosphate in 1996, phosphate levels, both inorganic and organic, are not at extremely low concentrations in the water. Nevertheless, the effects of the rapid and substantial change in the ratio of inorganic nitrogen to inorganic phosphate in the system have yet to be adequately explored.

CHANGES IN FOOD AVAILABILITY AND QUALITY

Significant changes in the food web may have affected food abundance and food quality available to delta smelt. From changes in zooplankton to declines in chlorophyll to increases in submerged aquatic vegetation, these changes have enormous effects on the amount and quality of food potentially available for various fish species (e.g., Muller-Solger et al., 2006; Bouley and Kimmerer, 2006). The benthic community was significantly changed after the overbite clam, *Corbula amurensis*, became dominant in the late 1980s; such changes have effects on food availability that may cascade through the food web to affect the abundance of delta smelt.

In addition to changes in food availability, other changes in the food web have had potentially large impacts on smelt. Since 1999, blooms of the cyanobacterium *Microcystis* have increased and are especially common in the central delta when water temperatures exceed 20°C (Lehman et al., 2005). Although delta smelt may not be in the central delta during the period of maximum *Microcystis* abundance, during dry years the spread of *Microcystis* extends well into the western delta so that the zone of influence may be greater than previously thought (Lehman et al., 2008). Most recently it has been demonstrated that the *Microcystis* toxin, microcystin, not only is present in water and in zooplankton, but histopathological studies have shown liver tissue impacts on striped bass and silversides (Lehman et al., 2010).

INTRODUCED FISHES

The delta is a substantially altered ecosystem, and that applies to the fish species present as well. Some environmental changes likely enhance the spread of nonnative species (for example

warm, irregularly flowing water around dams or diversions can favor warm-water species) (FWS 2008 p. 147), as can the presence of riprap to support banks (Michny and Hampton, 1984). Thus, the spread of nonnative species may be, at least in part, an effect of other ecosystem changes. Once nonnative species become established, they further alter the ecosystem. Some species, such as American shad (*Alosa sapidissima*) and striped bass (*Morone saxatilis*), native to the Atlantic and Gulf coasts of North America, have been present in the delta region since the late 19th century (Lampman, 1946; Moyle, 2002). Striped bass (along with the native Sacramento pikeminnow, *Ptychocheilus grandis*) have been implicated as predators on juvenile Chinook salmon, especially when they congregate below the Red Bluff Diversion Dam (Tucker et al., 2003) and other structures; at the Suisun Marsh Salinity Control Gates they were the dominant predator on juvenile Chinook salmon (Edwards et al., 1996; Tillman et al., 1996). Other introductions are more recent, and some might be more threatening to native species. For example, the silverside, *Menidia beryllina*, is becoming more widespread in the delta and likely preys on juvenile delta smelt (Moyle, 2002) or competes for similar copepod prey (Bennett and Moyle, 1996). Largemouth bass (*Micropterus salmoides*) and many other members of its family (Centrarchidae), along with various species of catfish (family Siluridae), native to the Mississippi and Atlantic drainages, also are increasing, while the lone member of the centrarchid family that was native to the region, the Sacramento perch (*Archoplites interruptus*), no longer occurs in the delta (Moyle 2002). All the above species include fish in their diets to a greater or lesser degree, including various life stages of delta smelt at times. In addition, other species, such as common carp (*Cyprinus carpio*) and threadfin shad (*Dorosoma petenense*), are not significant piscivores, but likely compete with delta smelt for food or otherwise affect their environment. Finally, the wakasagi (*Hypomesus nipponensis*), an introduced Japanese smelt very similar to the delta smelt, is becoming increasingly widespread in the delta. It interbreeds and competes with the delta smelt and might prey on it, and its presence in the delta complicates the assessment of delta smelt populations and salvage because it is so similar to the delta smelt that it is not easy to distinguish between the two species (Moyle, 2002). Delta smelt have co-existed with many of these alien fishes for more than 100 years before the recent declines, and so the decline of smelt cannot be attributed entirely to their presence, but some species have increased recently and their effects on smelt and salmonids—including on the potential for smelt populations to recover—have not been well studied.

IMPEDIMENTS TO PASSAGE, CHANGES IN OCEAN CONDITIONS, FISHING, AND HATCHERIES

Clark (1929) estimated that 80% of the original spawning habitat available to Chinook salmon in California's Central Valley had been made unavailable by blockages, mainly dams, by 1928. A similar loss of habitat has occurred for Central Valley steelhead as well (Lindley et al., 2006). Dams, diversion points, gates, and screens also affect green sturgeon. Ocean conditions vary, and in general they fluctuate between periods of relatively high productivity for salmon and lower productivity (Hare et al., 1999; Mantua and Hare, 2002). Lindley et al. (2009) concluded that ocean conditions have recently been poor for salmon, although there has been a long-term, steady deterioration in freshwater and estuarine environments as well. Sport and commercial fishing for salmon, sturgeon, and steelhead has been tightly regulated both at sea and in freshwater, and in 2008, there was a complete closure of the commercial and recreational fishery for

Chinook salmon (NMFS, 2009, page 145). However, Chinook salmon make very long oceanic migrations and their bycatch in other fisheries cannot be totally eliminated (NRC 2005). Hatchery operations have been controversial, but it is almost impossible to operate hatcheries without adverse genetic and even ecological effects on salmon (NRC, 2004b; NMFS, 2009, page 143) or steelhead (NMFS, 2009, page 143).

DISEASES

Histopathological studies have revealed a range of diseases of potential concern in the delta. For example, parasites have been found in threadfin shad gills, but not at a high enough infection rate to be of alarm, but evidence from endocrine disruption analyses shows some degree of intersex delta smelt males, having immature oocytes in the testes (Teh et al., unpublished data). Other investigators have found myxosporean infections in yellowfin goby in Suisun Marsh (Baxa et al., unpublished data). These and other measures suggest that parasitic infections, viral infections, or other infections are affecting fish, and that interactions with other stressors, such as contaminants, may be having increasing effects on fish.

CLIMATE CHANGE

Climate change could have severe negative consequences for the listed fishes. There are at least three reasons why this is of concern. First, the recent meteorological trend has runoff from the Sierra Nevada shifting from spring to winter as more precipitation falls as rain rather than snow, and as snowmelt occurs earlier and faster because of warming, increasing the likelihood and frequency of winter floods and altered hydrographs, and thus changes in the salinity of delta water (Roos, 1987, 1991; Knowles and Cayan, 2002, 2004). Alteration of precipitation type and timing of runoff may affect patterns in reproduction of the smelt and migration of salmon and sturgeon (Moyle, 2002). Additionally, effects of sea-level rise will increase salinity intrusion further upstream, again impacting fish distributions that rely on salinity gradients to define habitat; their habitat will be reduced. Lastly, as climate warms, so too does the water. This will impact fish distributions in several ways. Temperature is a cue for many biological processes, so many stages of the life cycle are likely to be affected. Moreover, warmer water will mean proportionately more days in which the temperature is in the lethal range, ~25°C (Swanson et al., 2000). The effects of these climate consequences are less suitable habitat for delta smelt in future years as well as threats to the migration of anadromous species like salmon and sturgeon.

CONCLUSION

Based on the evidence summarized above, the committee agreed that the adverse effects of all the other stressors on the listed fishes are potentially large. Time did not permit full exploration of this issue in this intense first phase of the committee's study. The committee will explore this issue more thoroughly in its second report.

6

Assessment of the RPAs

INTRODUCTION

The RPAs include many specific actions that fall into several categories for each species. The RPA in the FWS biological opinion for delta smelt focuses on limiting OMR negative flows in winter to protect migrating adults (Actions 1 and 2) and to protect larval smelt (Action 3) from entrainment at the export pumps. It also aims to protect estuarine habitat for smelt during the fall by managing the position of X2 (Action 4). Action 5 is to protect larval and juvenile smelt from entrainments by refraining from installing the Head of Old River Barrier (HORB) depending on conditions; if the HORB is installed, then the Temporary Barrier Project's gates would remain open. Finally, Action 6 calls for restoration and construction of 8,000 acres of intertidal and tidal habitat.

The RPA in the NMFS biological opinion for Chinook salmon, Central Valley steelhead, and green sturgeon is divided into far too many specific actions (72) to summarize here, but the biological opinion describes 10 major effects of the RPA on the listed species. They include management of storage and releases to manage temperature in the Sacramento River for steelhead and salmon; maintaining flows and temperatures in Clear Creek for spring-run Chinook salmon; opening gates at the Red Bluff Diversion Dam (RBDD) at critical times to promote passage for salmon and sturgeon; improving rearing habitat for salmon in the lower Sacramento River and in the northern delta; closure of the gates of the Delta Cross Channel (DCC) at critical times to keep juvenile salmon and steelhead out of the interior delta and instead allowing them to migrate out to sea; limiting OMR negative flows to avoid entrainment of juvenile salmon; increased flows in the San Joaquin River and curtailment of water exports to improve survival of San Joaquin steelhead smolts, along with an acoustic tagging program to evaluate the effectiveness of this action; flow and temperature management on the American River for steelhead; a year-round flow regime on the Stanislaus River to benefit steelhead; and the development of Hatchery Genetics Management Plans at the Nimbus (American River) and Trinity River hatcheries to benefit steelhead and fall-run Chinook salmon.

Rather than review every action and every detail, the committee comments on the broader concepts at issue and general categories of actions. Three important goals are to consider how well the RPAs are based on available scientific information; whether there are any potential RPAs not adopted that would have lesser impacts to other water uses as compared to those adopted in the biological opinions, and would provide equal or greater protection for the listed fishes; and whether there are provisions in the FWS and NMFS biological opinions to resolve potential incompatibilities between them. In addition we assess the integration of the RPAs within and across species and across all actions.

Addressing these goals requires explicitly recognizing the fundamental differences in the main conflicting arguments. There is concern, on one hand, that the increasing diversions of water from the delta over a period of many decades and the alteration of the seasonal flow regime

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have contributed to direct effects on populations of native species through mortality at the pumps, changes in habitat quality, and changes in water quality; and to indirect, long-term effects from alterations of food webs, biological communities, and delta-wide habitat changes. The RPAs propose that their collective effects will offset the impacts of the proposed operations of the SVP and the CWP by manipulating river flows and diversions, along with other actions. An alternative argument is that the effects of water diversions on the listed fishes are marginal. It is argued that the changes imposed by the RPAs would result, therefore, only in marginal benefits to the species, especially now that the delta environment and its biota have been altered (to a new ecological baseline) by multiple stressors. Those stressors obviously include water exports, but this argument suggests a smaller role for water exports in causing the fish declines and hence a smaller role for managing the exports to reduce or halt those declines. However, even with the copious amounts of data available, it is difficult to draw conclusions about what variable or variables are most important among the pervasive, irregular, multivariate changes in the system that have occurred over the past century.

The committee's charge was to provide a scientific evaluation, not a legal one, and that is what is presented below. Nothing in this report should be interpreted as a legal judgment as to whether the agencies have met their legal requirements under the ESA. The committee's report is intended to provide a scientific evaluation of agency actions, to help refine them, and to help the general attempt to better understand the dynamics of the delta ecosystem, including the listed fishes.

DELTA SMELT

Actions Related to Limiting Flow Reversal on the Old and Middle Rivers (OMR)

The general purpose of this set of actions is to limit the size of the zone of influence around the water-diversion points at critical times. The actions would limit negative OMR flows (i.e., toward the pumps) by controlling water exports during crucial periods in winter (December through March) when delta smelt are expected to be in the central delta (FWS, 2008). The data supporting this approach show an increase in salvage of delta smelt as OMR flows become more negative. However, there are important disagreements about how to express salvage and the choice of the trigger point or threshold in negative flows above which diversions should be limited.

An important issue is whether and how salvage numbers should be normalized to account for delta smelt population size. An increase in salvage could be due to an increase in the number of smelt at risk for entrainment, an increase in negative flows that bring smelt within range of the pumps, or both. Thus, an increase in salvage could reflect a recovery of the smelt population or it could reflect increasingly adverse flows toward the pumps for the remaining smelt population. The biological opinion (FWS, 2008) recognizes this relationship, and that is why salvage is used to calculate the percentage of the population entrained, rather than absolute numbers (FWS, 2008, Figures E-4 and E-5). However, the historical distribution of smelt on which the relationship with OMR flows was established no longer exists. Delta smelt are now sparsely distributed in the central and southern delta (www.dfg.ca.gov/delta/data), and pump salvage also has been extremely low, less than 4% of the 50-year average index. Since 2005, a significant portion of the remaining smelt population, 42% (Sommer et al., 2009), is in the Cache Slough complex to

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the north and is therefore largely isolated from the central delta. These changes in the distribution of delta smelt increase the uncertainty surrounding current estimates of the population and its likely response to alterations in delta hydraulics, and until the numbers of smelt rise closer towards the pre-2005 levels, they do not provide a reliable index for incorporation into models for the effects of pumping on smelt salvage.

Different authors have taken different statistical approaches to analyzing the data to interpret the relationship between OMR flows and effects on smelt, and thus chose different thresholds at which OMR flows should be limited. The choice of the limit to negative flows in the RPA gives the benefit of the doubt to the species. But there are important uncertainties in the choice. The different trigger points suggested by the different analyses have important implications for water users. The committee concludes that until better monitoring data and comprehensive life-cycle and fish-movement models are available, it is scientifically reasonable to conclude that high negative OMR flows in winter probably adversely affect smelt. We note as well that actions 1 and 2 of the FWS RPA are adaptive in that they depend for their implementation on a trigger related to measured turbidity and measured salvage numbers; they also may be suspended during three-day average flows of 90,000 cfs or greater in the Sacramento River at Rio Vista and 10,000 cfs or greater in the San Joaquin River at Vernalis. However, the portion of the existing smelt population in the Cache Slough complex appears not to move downstream towards the brackish areas (Sommer et al., 2009) and thus they should be largely insulated from the effects of the OMR flows and actions 1 and 2.

The biological benefits and the water requirements of this action are likely to be sensitive to the precise values of trigger and threshold values. There clearly is a relationship between OMR flows and salvage rates, but the available data do not permit a confident identification of the threshold values to use in the action, and they do not permit a confident assessment of the benefits to the population of the action. As a result, the implementation of this action needs to be accompanied by careful monitoring, adaptive management, and additional analyses.

Some monitoring and reporting is required in RPA component 5 (monitoring and reporting). However, more should be required, recognizing limits to the agencies' and operators' human and fiscal resources. Given the uncertainties in any choice of a trigger point, a carefully designed study that directly addresses measures of the performance (effectiveness) of the action is essential. This could include monitoring of variables like salvage at the pumps and numbers of delta smelt adults and larvae at the south ends of OMR channels during pumping actions, but it should also include other variables that might affect both salvage and populations. History shows that salvage and delta smelt indices have been insufficient for such an analysis alone, partly because the populations are small and partly because of the uncertainties in the salvage numbers (e.g., to what degree do they accurately reflect mortality, and to what degree are they affected by sampling error?). This deficiency in the data needs to be remedied. But other "proximate" measures such as monitoring of flows over the tidal cycle between and during the pumping limitations could help to understand the driving mechanism for the predicted entrainment mortality associated with pumping. Measuring mean daily discharges also is not sufficient. Temperature, salinity, turbidity, and possibly other environmental factors should also be monitored at appropriate scales as this action is implemented, to determine the availability of suitable habitat in the south delta during periods of reduced pumping. Information also is needed on how fish movement is affected by the immediate water-quality and hydraulic environment they experience. Because the effectiveness of the pumping needs to be expressed in terms of the population, the influence of pumping needs to be identified in more life-stage and area specific measures. In particular, the

relevance of the Cache Slough complex needs to be resolved in assessing the effectiveness of pumping restrictions. In addition, because uncertainty is high regarding several aspects of this action, it would be helpful to include an accounting of the water requirements. Ongoing evaluation of performance measures could ultimately reduce the water requirements of actions and increase the benefits to the species. Addressing the effectiveness of the proposed actions on a long-term basis could also support consensus conclusions about the effectiveness of specific actions and increase public trust. To the degree that such studies could be jointly planned and conducted by the agencies and other interested parties, transparency and public trust would be enhanced.

X2 Management for Delta Smelt

Although the mean position of X2, the isohaline (contour line of equal salinity) of total salinity 2, is a measure of the location of a single salinity characteristic, it is used in this system to indicate the position and nature of the salinity gradient between the Sacramento River and San Francisco Bay. The position of X2 is measured in kilometers from the Golden Gate Bridge. In the RPA, it has been used by the agencies as a measure of the amount of smelt habitat—influenced by salinity as well as temperature and turbidity, which are also driven by the river-estuary interaction—and thus to approximate the seasonal extent and shifting of that habitat within the ecosystem. By this reasoning, the position of X2 affects the size of delta smelt habitat (Feyrer et al., 2007; Kimmerer, 2008a).

The RPA's action 4 (FWS, 2008, page 369) proposes to maintain X2 in the fall of wet years at 74 km east of the Golden Gate Bridge and in above-normal years at 81 km east. (The action was restricted to wetter years in response to consultation with the NMFS, which expressed concern that in drier years, this action could adversely affect salmon and steelhead [memorandum from FWS and NMFS to this committee on coordination, January 15, 2010].) The action is to be achieved primarily by releases from reservoirs. The objective of the component is to manage X2 to increase the quality and quantity of habitat for delta smelt growth and rearing.

The relationship between the position of X2 and habitat area for delta smelt, as defined by smelt presence, turbidity, temperature, and salinity (Nobriga et al, 2008; Feyrer et al., in review), is critical in designing this action. A habitat-area index was derived from the probability of occurrence estimates for delta smelt (fall mid-water trawl survey, FMT) when individuals are recruiting to the adult population. Presence/absence data were used because populations are so small that quantitative estimates of populations probably are unreliable. The authors show a broad relationship between the FMT index and salinity and turbidity, supporting the choice of these variables as habitat indicators. The statistical relationship is complex. When the area of highly suitable habitat as defined by the indicators is low, either high or low FMT indices can occur. In other words, delta smelt can be successful even when habitat is restricted. More important, however, is that the lowest abundances all occurred when the habitat-area index was less than 6,000 ha. This could mean that reduced habitat area is a necessary condition for the worst population collapses, but it is not the only cause of the collapse. Thus, the relationship between the habitat and FMT indexes is not strong or simple. Above a threshold on the x-axis it allows a response on the y-axis (allows very low FMT indices).

The controversy about the action arises from the poor and sometimes confounding relationship between indirect measures of delta smelt populations (indices) and X2. The weak statistical

relationship between the location of X2 and the size of smelt populations makes the justification for this action difficult to understand. In addition, although the position of X2 is correlated with the distribution of salinity and turbidity regimes (Feyrer et al., 2007), the relationship of that distribution and smelt abundance indices is unclear. The X2 action is conceptually sound in that to the degree that habitat for smelt limits their abundance, the provision of more or better habitat would be helpful. However, the examination of uncertainty in the derivation of the details of this action lacks rigor. The action is based on a series of linked statistical analyses (e.g., the relationship of presence/absence data to environmental variables, the relationship of environmental variables to habitat, the relationship of habitat to X2, the relationship of X2 to smelt abundance), with each step being uncertain. The relationships are correlative with substantial variance being left unexplained at each step. The action also may have high water requirements and may adversely affect salmon and steelhead under some conditions (memorandum from FWS and NMFS, January 15, 2010). As a result, how specific X2 targets were chosen and their likely beneficial effects need further clarification.

The X2 action for delta smelt includes a requirement for an adaptive management process that includes evaluation of other possible means of achieving the RPA's goal and it requires the establishment and peer review of performance measures and performance evaluation. It also requires "additional studies addressing elements of the habitat conceptual model" to be formulated as soon as possible and to be implemented promptly. Finally, it requires the FWS to "conduct a comprehensive review of the outcomes of the Action and the effectiveness of the adaptive management program ten years from the signing of the biological opinion, or sooner if circumstances warrant." This review is to include an independent peer review; the overall aim is to decide whether the action should be continued, modified, or terminated. It is critical that these requirements be implemented in light of the uncertainty about the biological effectiveness of the action and its high water requirements.

Tidal Habitat Action

The proposed RPA calls for the creation or restoration of 8,000 acres of intertidal and associated subtidal habitat in the delta and in Suisun Marsh. A separate planning effort also is under way for Suisun Marsh. The justification provided in the biological opinion is that the original amount of approximately 350,000 acres of tidal wetland has been reduced to less than 10,000 acres today, that the near-complete loss of tidal wetlands threatens delta smelt by reducing productivity at the base of the food web, and that delta smelt appear to benefit from the intertidal and subtidal habitat in Liberty Island, which includes tidal wetlands. This action has been less controversial than the others because it does not directly affect other water users.

However, although the concept of increasing and improving habitat to help offset other risks to smelt is conceptually sound, the scientific justification provided in the biological opinion is weak, because the relationship between tidal habitat and food availability for smelt is poorly understood, and it is inadequate to support the details of the implementation of this action. The opinion notes the importance of high-quality food sources to delta smelt and the association of these food resources with tidal habitats (including wetlands), and it references recent monitoring data from Liberty Island showing that such freshwater tidal habitats can be a source of high-quality phytoplankton that contribute to the pelagic food web downstream (p. 380). However,

the specifics of which attributes of tidal habitat are essential to providing these food sources are not addressed.

In addition, the California Department of Fish and Game has raised questions about the details of this action (Wilcox, 2010). They include questions about the relative benefits of vegetated tidal marsh as opposed to open water; the extent to which invasive clams may divert new primary production; the amount of suitable productivity exported from restoration areas; the potential effect of the restored habitat on predation; the importance of productivity from vegetated tidal marsh directly or indirectly to the smelt; and the degree to which other fish species might use the habitat, possibly to the detriment of the smelt. In briefings to the panel, the importance of ongoing studies in resolving these issues was identified. Identifying the characteristics of the "intertidal and associated subtidal habitat" that the action is expected to produce is needed to ensure that expectations of the outcomes, in terms of both habitat type and species benefits, are clear to all. The relative roles of areas of emergent vegetation, unvegetated intertidal and shallow, highly turbid subtidal habitat must be identified for the action to be effectively implemented.

The committee recommends that this action be implemented in phases, with the first phase to include the development of an implementation and adaptive management plan (similar to the approach used for the floodplain habitat action in the NOAA biological opinion), but also to explicitly consider the sustainability of the resulting habitats, especially those dependent on emergent vegetation, in the face of expected sea-level rise. In addition, there should be consideration of the types and amounts of tidal habitats necessary to produce the expected outcomes and how they can be achieved and sustained in the long term. More justification for the extent of the restoration is needed. The committee supports the monitoring program referred to in Action 6, and appropriate adaptive management triggers and actions.

SALMONIDS AND STURGEON

The NMFS RPA for salmon, steelhead, and green sturgeon is a broad complex of diverse actions spanning three habitat realms: tributary watersheds, the mainstem Sacramento and San Joaquin Rivers, and the delta. On balance, the actions are primarily crafted to improve life-stage-specific survival rates for salmon and steelhead, with the recognition that the benefits also will accrue to sturgeon. The committee agrees with this approach. The conceptual bases of the strategies underpinning many of the individual actions are generally well-founded, although the extent to which the intended responses are likely to be realized is not always clear. Given the absence of a clear, quantitative framework for analyzing the effects of individual and collective actions, it is difficult to make definitive statements regarding the merits of such a complex RPA. Indeed, absent such an analysis, the controversial aspects of some of the RPA actions could detract from the merits of the rest of the RPA.

The assortment of actions among the three habitat realms (watersheds, mainstem rivers, and delta) is designed to improve survival and to enhance connectivity throughout this system. This approach is consistent with the contemporary scientific consensus on improving ecosystem functioning as a means to improve productivity of anadromous and other migratory species (e.g., Williams 2005; NRC 1996, 2004a, 2004b). Watershed actions would be pointless if mainstem passage conditions connecting the tributaries to, and through, the delta were not made satisfactory.

Watershed and Mainstem River Actions

Watershed-level actions that are implemented in the tributaries are organized and formulated to meet the needs of specific listed populations in that system. The actions target limiting factors specific to those locales and populations. In general, the rationale for conducting the actions appears to be well-founded. However, it is difficult to ascertain to what extent, or even whether, the collective actions will appreciably reduce the risk to the fishes within the watershed or throughout the entire river system. We suggest that inclusion of some type of quantitative analysis using a tool like Ecosystem Diagnosis and Treatment (EDT) model during the planning process may have provided an even stronger justification for the set of actions selected (<http://jonesandstokes.com/>). We understand there is a recent application of EDT in the lower San Joaquin River, by Jones & Stokes, thus providing a precedent for its use in California's Central Valley. EDT is presented here as an example of a quantitative modeling approach that integrates the effects of various actions to produce relative changes in productivity and abundance. The committee emphasizes the need for a quantitative assessment framework, and does not necessarily specifically advocate the use of EDT.

The RPA also prescribes actions to improve mainstem passage conditions, most notably at the Red Bluff Diversion Dam (RBDD). The objective is to provide unobstructed upstream passage at the RBDD, to ensure more efficient access of adult salmonids to restored watersheds, and access for adult sturgeon to spawning grounds. Without such actions connectivity could not be fully realized. Furthermore, the passage improvement at the diversion dam, in combination with increased water delivery from storage reservoirs, is expected to improve smolt survival during downstream migration. This component is well justified scientifically, although the absence of a system-wide salmon survival model limits our ability to evaluate the extent to which this action contributes to improved survival for the populations in question.

Smolt Survival Near and Through the Delta

The net survival of salmonid smolts through the mainstem rivers and the delta under different water-management operations is of keen interest. Several RPA actions are intended to improve survival of the juveniles as they migrate seaward. Some of these actions have significant water requirements, and so they are controversial. The common goal of these actions is improve smolt survival by retaining a high proportion of the migrating smolt population in the mainstem Sacramento and San Joaquin Rivers. This involves two general approaches: block entrances to the interior delta, or manipulate currents in major channels to reduce the transport of smolt towards the pump facilities and possible entrainment or locations where they may be lost to predation, starvation, or disease. Here we focus on three pivotal actions: the closure of the Delta Cross Channel, the manipulation of OMR flows, and water-management actions in the lower San Joaquin River.

Delta Cross Channel (DCC)

As smolts migrate seaward from the upper Sacramento River they encounter the DCC near Walnut Grove. The DCC can at times draw large volumes of water from the Sacramento River,

and some of the smolts follow that current toward the interior delta, where salmon mortality is high.

The objective of this action is to physically block the entrance of the DCC at strategic times during the smolt migration, thereby preventing access to the interior delta. This is a long-standing action that appears to be scientifically justified. However, Burau et al. (2007) estimated that when the DCC gates are open, approximately 45 percent of the Sacramento River flow measured at Freeport is redirected into the delta interior through the DCC and Georgiana Slough. The salmon action (Action Suite IV.1), which under certain triggers requires prolonged closure of the DCC gates from October 1 through June 15, must also consider the effects on delta smelt. The Smelt Working Group (notes from June 4, 2007 meeting) concluded that there could be a small beneficial effect on delta smelt from having the DCC gates open from late May until mid-June.

Although this action does not appear to constitute an important conflict between the needs of smelt and salmon, it illustrates the potential for conflict among the two opinions and the need for closer integration of the actions within the delta that have consequences for more than one of the listed species. This is an example where a systematic analysis of the implications for both species of actions would seem to be a scientific requirement.

Managing OMR Flows for Salmonids

This RPA action (IV.2.3, Old and Middle River Flow Management) also seeks to limit smolt excursion into part of the delta associated with high smolt mortality, but it does so by manipulating current direction and intensity within the Old and Middle River (OMR) drainages. The objective is to reduce current velocity toward the SWP and CVP facilities, thereby exposing fewer smolts to pump entrainment and being drawn into other unfavorable environments.

To accomplish the objective, the action calls for, reducing exports from January 1 through June 15, as necessary, to limit negative OMR flows to -2,500 to -5,000 cfs, depending on the presence of salmonids. The reverse flow will be managed within this range to reduce flows toward the pumps during periods of increased salmonid presence. The flow range was established through correlations of OMR flow and salmon entrainment indices at the pumps, and from entrainment proportions derived using the particle-tracking model (PTM). While the flow management strategy is conceptually sound, the threshold levels needed to protect fish is not definitively established. The response of loss at the pumps to OMR flow (e.g. figure 6-65 from NMFS, 2009) does not suggest a significant change in the vicinity of the flow triggers, but it does suggest that the loss rate increases exponentially above the triggers. The PTM suggests a gradual linear response in the vicinity of the trigger. However, no analysis was presented for the entrainment rate above the trigger (Figure 6-68 from NMFS, 2009), and it is not clear whether the salvage *rates* as well as salvage numbers were modeled. Therefore, the committee is unable to evaluate the validity of the exponential increase in loss rate above the trigger. Uncertainty in the effect of the flow triggers needs to be reduced, and more flexible triggers that might require less water should be evaluated.

The committee concludes that the strategy of limiting net tidal flows toward the pump facilities is sound, but the support for the specific flows targets is less certain. In the near-term telemetry-based smolt migration and survival studies (e.g. Perry and Skalski, 2009) should be used to improve our understanding of smolt responses to OMR flow levels. Reliance on salvage indices or the PTM results alone is not sufficient.

Additionally, there is little direct evidence to support the position that this action alone will benefit the San Joaquin salmon, unless it is combined with an increase in San Joaquin River

flows. Furthermore, we understand this and other flow management actions are coordinated with the delta smelt actions. But we found no quantitative analysis that integrates across the actions to systematically evaluate their aggregate effects on both salmonids and smelt. Understanding those interactions will benefit from the development and use of multiple single-species models, including movement models.

Managing Exports and Flows in the San Joaquin River

The objective of this action (IV.2.1) is to reduce the vulnerability of emigrating Central Valley steelhead within the lower San Joaquin River to entrainment into the channels of the south delta and at the pumps by increasing the inflow-to-export ratio. It seeks to enhance the likelihood of salmonids' successfully exiting the delta at Chipps Island by creating more suitable hydraulic conditions in the mainstem of the San Joaquin River for emigrating fish, including greater net downstream flows.

The action has two components: reducing exports, and augmenting San Joaquin River flows at Vernalis. The rationale that increasing San Joaquin inflows to the delta will benefit smolt survival through this region of the delta is based on data from coded-wire tags on smolts. This statistical evidence provides only a coarse assessment of the action, but it indicates that increasing San Joaquin River flows can explain observed increases in escapement. Historical data indicate that high San Joaquin River flows in the spring result in higher survival of outmigrating Chinook salmon smolts and greater adult returns 2.5 years later (Kjelson et al., 1981; Kjelson and Brandes, 1989), and that when the ratio between spring flows and exports increase, Chinook salmon production increases (CDFG, 2005; SJRGA, 2007). In its biological opinion, NMFS therefore concludes that San Joaquin River Basin and Calaveras River steelhead would likewise benefit under higher spring flows in the San Joaquin River in much the same way as fall-run Chinook do. NMFS recognizes this assumption is critical, and thus the biological opinion calls for implementation of a 6-year smolt-survival study (acoustic tags) (Action IV.2.2), using hatchery steelhead and fall Chinook.

The controversy lies in the effectiveness of the component of this action that reduces water exports from the delta. The effectiveness of reducing exports to improve steelhead smolt survival is less certain, in part because within the VAMP (Vernalis Adaptive Management Plan) increased flows and reduced exports are combined, and in part because steelhead smolts are larger and stronger swimmers than Chinook salmon smolts. Furthermore, it is not clear in the biological opinion how managing exports for this purpose would be integrated with export management for other actions. The choice of a 4:1 ratio of net flows to exports appears to be the result of coordinated discussions among the interested parties. Given the weak influence of exports in all survival relationships (Newman, 2008), continued negotiation offers opportunities to reduce water use in this specific action without great risk to salmon. Further analysis of VAMP data also offers an opportunity to help clarify the issue.

The committee concludes that the rationale for increasing San Joaquin River flows has a stronger foundation than the prescribed action of concurrently managing inflows and exports. We further conclude that the implementation of the 6-year steelhead smolt survival study (action IV.2.2) could provide useful insight as to the actual effectiveness of the proposed flow management actions as a long-term solution.

Increase Passage through Yolo Bypass

This action would reduce migratory delays and loss of adult and juvenile salmon and green sturgeon at structures in the Yolo Bypass. For sturgeon there is substantial evidence that improved upstream passage at Yolo will be beneficial. For salmon, the purpose is to route salmon away from the interior delta and through a habitat that is favorable for growth. This action is scientifically justified and prudent, but its implications for the routing of flows through the system as a whole were not transparently evaluated. For example, moving water through the Yolo Bypass results in less water coming through the Sacramento River. Were the effects of less flow in the Sacramento River considered in the design of the action? Similarly, how were the possible negative consequences of increased flooding of the Yolo Bypass on mercury cycling considered? This exemplifies a general tendency throughout the discussion of the actions to focus on the biologically beneficial aspects but to not fully present how any conflicting consequences or potential for such consequences were considered.

Floodplain Habitat

The floodplain habitat actions (Actions I.6.1-4) involve increasing the inundation of private and public lands within the Sacramento River basin to increase the amount and quality of rearing habitat for juvenile salmon. This action suite appears scientifically justified on the basis of a number of studies (e.g., Sommer et al., 2001; Whitener and Kennedy, 1999; Moyle et al., 2007). Given the strong basis, the committee recommends early implementation of these actions providing the implications for releases and routing of flows on other actions, and any potential negative consequences, e.g., mobilization of mercury, are adequately considered. In addition, the committee suggests detailed studies of the outcome of these actions to provide important data for improved life cycle models for these species.

INTEGRATION OF RPAs

The RPAs lack a quantitative analytical framework that ties them together within species, between smelt and salmonid species, and across the watershed. This type of systematic, formalized analysis is necessary to provide an objective determination of the net effect of the actions on the listed species and on water users.

An additional overall, systematic, coordinated analysis of the effect of all actions taken together and a process for implementing the optimized, combined set of actions would help to establish the credibility of the effort overall. Instances of coordination certainly exist. For example, the analysis done by NMFS for the Action IV.2.1 (Appendix 5), is an example of coordination, where the water needs for the 4-to-1 flow-to-export ratio for steelhead were determined and used to refine the action. But coordination is not integration. The lack of a systematic, well framed overall analysis is a serious deficiency. The interagency effort to transparently reach consensus on implications of the combined RPAs for their effects on all the species and on water quality and quantity within the delta and on water operations and deliveries should use scientific principles and methods in a collaborative and integrative manner. Full documentation of deci-

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sions is an essential part of such an effort, as is inclusion of the environmental water needs of specific actions and for the entire RPA.

It is clear that integrative tools that, for example, combine the effect over life stages into a population-level response would greatly help the development and evaluation of the combined actions. This was acknowledged by the FWS and NMFS, as well by many of the other presenters during the two days of public session of the committee meeting. There has been significant investment in operations and hydrodynamic models for the system, which have been invaluable for understanding and managing the system. An investment in ecological models that complement the operations and hydrodynamics models is sorely needed. This issue has been raised repeatedly in peer reviews, but still has not been incorporated in the NMFS and FWS analyses. Without a quantitative integration tool, the expected effects of individual actions on the listed species will remain a matter of judgment based on the interpretation of many disparate studies. The NMFS and FWS had to therefore determine the cumulative effects of the multiple actions in each RPA in a qualitative manner. This leads to arguments and disputes that are extremely difficult to resolve and that can undermine the credibility of the biological opinions. Commitment to a long-term effort to develop a quantitative tool (or tools) should be part of the RPA, with the explicit goal of formalizing and focusing the sources of disagreement and allowing for the clear testing of alternative arguments.

Transparent consideration of the implications of water requirements also would seem well advised because some of the actions have significant water requirements. DWR and NMFS used CalSim-II and Calite to simulate a collection of actions to determine water needs associated with the NMFS RPA, and concluded that they would amount to 5-7% of total water allocations (NMFS, 2009). (Because the actions involving negative OMR flows were similar in timing and magnitude in both the NMFS and the FWS RPAs, all OMR flow management was included in this estimate.) Those, and complementary efforts, should be extended to as many of the actions in combination as feasible, recognizing that the adaptive nature of many aspects of the RPAs, along with variations in environmental conditions and in water demands, limit the degree of certainty associated with such estimates. Credible documentation of the water needed to implement each action and the combined actions, would enable an even clearer and more logical formulation of how the suite of actions might be coordinated to simultaneously benefit the species and ensure water efficiency.

OTHER POSSIBLE RPAs

The committee's charge included the task that the committee should identify, if possible, additional potential RPAs that would provide the potential to provide equal or greater protection to the fishes than the current RPAs while costing less in terms of water availability for other uses. The committee considered RPAs that had been considered and rejected by the agencies or that were recommended to the committee for its consideration (Hamilton 2010). They included using bubble-curtain technology instead of hard barriers to direct migration of salmon and steelhead smolts, use of weirs to protect wild steelhead from interbreeding and competition, use of weirs to reduce spring-run Chinook from inbreeding and competition with fall-run Chinook, habitat restoration and food-web enhancement, restoration of a more-natural hydrograph, reducing mortality caused by nonnative predators, reducing contaminants, reducing other sources of "take," imple-

mentation of actions to reduce adverse effects of hatcheries, and ferrying San Joaquin River steelhead smolts through the delta.

Some of these are already included to some degree in the RPAs (e.g., reduction of adverse hatchery effects, habitat restoration), and some might not be within the agencies' authorities as RPA actions under the ESA (e.g., contaminant reduction and reduction of other sources of "take"). The committee did not attempt to evaluate whether these suggestions represent good actions to help reduce risks to the listed species in a general attempt at restoration, as that will be addressed in the committee's second report. The committee concludes that none of the above suggested alternative RPAs has received sufficient documentation or evaluation to be confident at present that any of them would have the potential to provide equal or greater protection for the listed species while requiring less disruption of delta water diversions.

Several long-term actions described above have the potential to increase protections for the species while requiring the use of less water for that purpose, because they will result in a better understanding of the system. That better understanding should allow for a better matching of water for species needs, thus potentially reducing the amount of water used in less-effective actions. However, no short-term measure was identified that would provide equal protection to the fishes while reducing restrictions on water diversions.

RESOLVING INCOMPATIBILITIES BETWEEN THE RPAs

The committee noted in its discussion of the Delta Cross Channel action for salmon that it has a small potential for conflict with the requirements for smelt, although the action itself includes a consideration of the effects on smelt. In addition, the agencies have coordinated, and in some cases changed, their actions to avoid or reduce such conflicts, including actions concerning the installation of a "non-physical" barrier at the Head of Old River and the possibility of constructing a barrier across Georgiana Slough (NMFS and FWS, 2010). However, as the committee has noted elsewhere, coordination is not integration, and while it commends the agencies for working together to avoid incompatibilities between the RPAs, it concludes that this coordination is not sufficient to achieve the best results or full evaluation of incompatibilities. To achieve those goals requires an integrated analysis, because without such an analysis it is difficult or impossible to properly evaluate potential conflicts among RPA actions. More important, such an analysis would help to produce more-effective actions. The lack of an integrated analysis also prevented the committee from a fuller evaluation of potential incompatibilities between the RPAs.

EXPECTATIONS AND PROXIMATE MEASURES

The committee heard several times at the public sessions that the RPA actions for delta smelt are not working as there has been no response in the standard annual abundance indices during the last 3 years when action-related restrictions have been imposed. Such comments are appropriate, but only if realistic expectations are used to judge effectiveness. In this case, it is unrealistic to expect immediate and proportional responses to actions in annual indices of delta smelt, especially within the first few years of implementation. There are several reasons for this. First, fish abundances are influenced by many factors not affected by the actions. This is true in all

estuarine and marine systems, and is simply inherent in fish population dynamics. For example, in the case of the species here, three drought years coincided with the implementation of the actions. Other factors have also varied that would further mask any response in the annual indices.

Second, delta smelt populations are very small. The ability of the annual indices to show changes in response to actions is compromised due to the inherent lack of precision in sampling and constructing indices of abundance when populations are very small. Unlike salmon and steelhead, the adults of which can be counted with great precision as they migrate upstream, delta smelt are more difficult to count as well as being rare. While this is frustrating, little change in the annual indices over a few years neither invalidates the utility of the actions nor do they demonstrate that the actions are effective. Finally, there were no prior quantified estimates of response to calibrate expectations. Expectations would be better established if the RPA proposals more explicitly quantified the nature and the expected timescale of responses in the target species, and detailed exactly what would be done to assess the validity of those predictions.

RPA RECOMMENDATIONS

The committee concluded that the uncertainties and disagreements surrounding some of the RPA actions could be reduced by some additional activities. In general, the committee recommends that, within the limits the agencies face with respect to human and financial resources, a more-integrated approach to analyzing adverse effects of water operations and potential actions to reduce those effects would be helpful. The approach would include a broader examination of the life cycles of each fish species and where possible, integrating analyses across species. Although there is much general evidence that the profound reduction and altered timing of the delta water supply has been part of the reason for the degradation of these species' habitats, the marginal benefits of beginning to reverse the damage will be difficult to recognize for some time and there is much uncertainty about how to design attempts at the reversal. At this time, the best that can be done is to design a strategy of pumping limitations that uses the best available monitoring data and the best methods of statistical analysis to design an exploratory approach that could include enhanced field measurements to manage the pumping limitations adaptively while minimizing impacts on water users. Such an approach would include a more explicit and transparent consideration of water requirements, despite the variability in environmental conditions and water demand; and population models to evaluate the combined effects of the individual actions.

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Appendixes

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Appendix A

Committee on Sustainable Water and Environmental Management in the California Bay-Delta

STATEMENT OF TASK

At the request of Congress and the Departments of the Interior and Commerce, a committee of independent experts will be formed to review the scientific basis of actions that have been and could be taken to simultaneously achieve both an environmentally sustainable Bay-Delta and a reliable water supply. In order to balance the need to inform near-term decisions with the need for an integrated view of water and environmental management challenges over the longer-term, the committee will undertake two main projects over a term of two years resulting in two reports.

First, by approximately March 15, 2010, the committee will issue a report focusing on scientific questions, assumptions, and conclusions underlying water-management alternatives in the U.S. Fish and Wildlife Service's (FWS) Biological Opinion on Coordinated Operations of the Central Valley Project and State Water Project (Dec. 15, 2008) and the National Marine Fisheries Service's (NMFS) Biological Opinion on the Long-Term Central Valley Project and State Water Project Operations Criteria and Plan (June 4, 2009). This review will consider the following questions:

- Are there any "reasonable and prudent alternatives" (RPAs), including but not limited to alternatives considered but not adopted by FWS (e.g., potential entrainment index and the delta smelt behavioral model) and NMFS (e.g., bubble-curtain technology and engineering solutions to reduce diversion of emigrating juvenile salmonids to the interior and southern Delta instead of towards the sea), that, based on the best available scientific data and analysis, (1) would have lesser impacts to other water uses as compared to those adopted in the biological opinions, and (2) would provide equal or greater protection for the relevant fish species and their designated critical habitat given the uncertainties involved?
- Are there provisions in the FWS and NMFS biological opinions to resolve potential incompatibilities between the opinions with regard to actions that would benefit one listed species while causing negative impacts on another, including, but not limited to, prescriptions that: (1) provide spring flows in the Delta in dry years primarily to meet water quality and outflow objectives pursuant to Water Board Decision-1641 and conserve upstream storage for summertime cold water pool management for anadromous fish species; and (2) provide fall flows during wet years in the Delta to benefit Delta smelt, while also conserving carryover storage to benefit next year's winter-run cohort of salmon in the event that the next year is dry?
- To the extent that time permits, the committee would consider the effects of other stressors (e.g., pesticides, ammonia discharges, invasive species) on federally listed and other at-risk species in the Bay-Delta. Details of this task are the first item discussed as part of the committee's second report, below, and to the degree that they cannot be addressed in the first report they will be addressed in the second.

Second, in approximately November 2011, the committee will issue a second report on how to most effectively incorporate science and adaptive management concepts into holistic programs for management and restoration of the Bay-Delta. This advice, to the extent possible, should be coordinated in a way that best informs the Bay Delta Conservation Plan development process. The review will include tasks such as the following:

- Identify the factors that may be contributing to the decline of federally listed species, and as appropriate, other significant at-risk species in the Delta. To the extent practicable, rank the factors contributing to the decline of salmon, steelhead, delta smelt, and green sturgeon in order of their likely impact on the survival and recovery of the species, for the purpose of informing future conservation actions. This task would specifically seek to identify the effects of stressors other than those considered in the biological opinions and their RPAs (e.g., pesticides, ammonia discharges, invasive species) on federally listed and other at-risk species in the Delta, and their effects on baseline conditions. The committee would consider the extent to which addressing stressors other than water exports might result in lesser restrictions on water supply. The committee's review should include existing scientific information, such as that in the NMFS Southwest Fisheries Science Center's paper on decline of Central Valley fall-run Chinook salmon, and products developed through the Pelagic Organism Decline studies (including the National Center for Ecosystem Analysis and Synthesis reviews and analyses that are presently under way).
- Identify future water-supply and delivery options that reflect proper consideration of climate change and compatibility with objectives of maintaining a sustainable Bay-Delta ecosystem. To the extent that water flows through the Delta system contribute to ecosystem structure and functioning, explore flow options that would contribute to sustaining and restoring desired, attainable ecosystem attributes, while providing for urban, industrial, and agricultural uses of tributary, mainstem, and Delta waters, including for drinking water.
- Identify gaps in available scientific information and uncertainties that constrain an ability to identify the factors described above. This part of the activity should take into account the Draft Central Valley Salmon and Steelhead recovery plans (NOAA 2009b), particularly the scientific basis for identification of threats to the species, proposed recovery standards, and the actions identified to achieve recovery.
- Advise, based on scientific information and experience elsewhere, what degree of restoration of the Delta system is likely to be attainable, given adequate resources. Identify metrics that can be used by resource managers to measure progress toward restoration goals.

The specific details of the tasks to be addressed in this second report will likely be refined after consultation among the departments of the Interior and Commerce, Congress, and the National Research Council, considering stakeholder input, and with the goal of building on, rather than duplicating, efforts already being adequately undertaken by others.

Appendix B

Water Science and Technology Board

CLAIRE WELTY, *Chair*, University of Maryland, Baltimore County
YU-PING CHIN, Ohio State University, Columbus
OTTO C. DOERING, Purdue University, West Lafayette, Indiana
JOAN G. EHRENFELD, Rutgers University, New Brunswick, New Jersey
GERALD E. GALLOWAY, JR., University of Maryland, College Park
CHARLES N. HAAS, Drexel University, Philadelphia, Pennsylvania
KENNETH R. HERD, Southwest Florida Water Management District, Brooksville, Florida
JAMES M. HUGHES, Emory University, Atlanta, Georgia
KIMBERLY L. JONES, Howard University, Washington, DC
MICHAEL J. MCGUIRE, Michael J. McGuire, Inc., Santa Monica, California
G. TRACY MEHAN III, The Cadmus Group, Inc., Arlington, Virginia
DAVID H. MOREAU, University of North Carolina, Chapel Hill
DENNIS D. MURPHY, University of Nevada, Reno
THOMAS D. O'ROURKE, Cornell University, Ithaca, New York
DONALD I. SIEGEL, Syracuse University, Syracuse
SOROOSH SOROOSHIAN, University of California, Irvine

Staff

STEPHEN D. PARKER, Director
JEFFREY JACOBS, Scholar
LAURA J. EHLERS, Senior Staff Officer
STEPHANIE E. JOHNSON, Senior Staff Officer
LAURA J. HELSABECK, Staff Officer
M. JEANNE AQUILINO, Financial and Administrative Associate
ELLEN A. DE GUZMAN, Senior Program Associate
ANITA A. HALL, Senior Program Associate
MICHAEL J. STOEVEER, Research Associate
STEPHEN T. RUSSELL, Senior Program Assistant

Appendix C

Ocean Studies Board

DONALD F. BOESCH (Chair), University of Maryland Center for Environmental Science, Cambridge
EDWARD A. BOYLE, Massachusetts Institute of Technology, Cambridge
JORGE E. CORREDOR, University of Puerto Rico, Mayagüez
KEITH R. CRIDDLE, University of Alaska Fairbanks, Juneau
JODY W. DEMING, University of Washington
MARY (MISSY) H. FEELEY, ExxonMobil Exploration Company, Houston, Texas
ROBERT HALLBERG, National Oceanic and Atmospheric Administration Geophysical Fluid Dynamics Laboratory and Princeton University, New Jersey
DEBRA HERNANDEZ, Southeast Coastal Ocean Observing Regional Association, Mt. Pleasant, South Carolina
ROBERT A. HOLMAN, Oregon State University, Corvallis
KIHO KIM, American University, Washington, DC
BARBARA A. KNUTH, Cornell University, Ithaca, New York
ROBERT A. LAWSON, Science Applications International Corporation, San Diego, California
GEORGE I. MATSUMOTO, Monterey Bay Aquarium Research Institute, Moss Landing, California
JAY S. PEARLMAN, The Boeing Company (ret.), Port Angeles, Washington
ANDREW A. ROSENBERG, Science & Knowledge Conservation International, Arlington, Virginia
DANIEL L. RUDNICK, Scripps Institution of Oceanography, La Jolla, California
ROBERT J. SERAFIN, National Center for Atmospheric Research, Boulder, Colorado
ANNE M. TRÉHU, Oregon State University, Corvallis
PETER L. TYACK, Woods Hole Oceanographic Institution, Massachusetts
DAWN J. WRIGHT, Oregon State University, Corvallis
JAMES A. YODER, Woods Hole Oceanographic Institution, Massachusetts

Staff

SUSAN ROBERTS, Board Director
CLAUDIA MENGELT, Senior Program Officer
DEBORAH GLICKSON, Program Officer
JODI BOSTROM, Associate Program Officer
SHUBHA BANSKOTA, Financial Associate
PAMELA LEWIS, Administrative Coordinator
HEATHER CHIARELLO, Senior Program Assistant
JEREMY JUSTICE, Senior Program Assistant

Appendix D

Speakers at Committee's Meeting January 24-29, 2010 University of California, Davis

Ara Azhderian, San Luis and Delta Mendota Water Authority
Barbara Barrigan-Parilla, Restore the Delta
Brett Baker, Delta Resident
Letty Belin, U.S. Department of the Interior
Cheryl Bly-Chester, UC Berkeley
Dan Castleberry, U.S. Fish and Wildlife Service
Jim Costa, U.S. House of Representatives, California-District 20
DeeDee D'Adamo, Office of U.S. Representative Dennis Cardoza, California-District 18
Cliff Dahm, CALFED (Delta Science Program)
Stan Dean, Sacramento Regional County Sanitation District, Director of Policy
Rick Deriso, Inter-American Tropical Tuna Commission
Diana Engle, Larry Walker Associates
Fred Feyrer, Bureau of Reclamation
David Fullerton, Metropolitan Water District of Southern California
Greg Gartrell, Contra Costa Water District
Zeke Grader, Pacific Coast Federation of Fishermen's Association
Cay Goude, U.S. Fish and Wildlife Service
Scott Hamilton, Coalition for a Sustainable Delta
Ann Hayden, Environmental Defense Fund
Bruce Herbold, U.S. Environmental Protection Agency
John Herrick, South Delta Water Agency
Jerry Johns, California Department of Water Resources
Harold Johnson, Pacific Legal Institute
Linda Katehi, University of California, Davis
Jason Larroba, Tehama-Colusa Canal Authority
Tom Lindemuth, Delta Science Center, Big Break
Steve Lindley, National Marine Fisheries Service
Craig Manson, Council for Endangered Species Act Reliability
BJ Miller, Consultant
Ron Milligan, Bureau of Reclamation
Jeffrey Mount, University of California, Davis
Peter B. Moyle, University of California, Davis
Steve Murawski, National Oceanic and Atmospheric Administration
Eligio Nava, Central Valley Hispanic Chamber
Dante John Nemellini, Central Delta Water Agency

PREPUBLICATION COPY

Matt Nobriga, California Department of Fish and Game
Doug Obegi, Natural Resources Defense Council
Tim O'Laughlin, O'Laughlin & Paris
Bruce Oppenheim, National Marine Fisheries Service
Richard Pool, Salmon fishing industry
Maria Rea, National Marine Fisheries Service
Rhonda Reed, National Marine Fisheries Service
Mark Renz, Association of California Water Agencies
Spreck Rosekrans, Environmental Defense Fund
Melanie Rowland, NOAA-General Counsel
Patricia Schuffon, Pacific Advocate Program
Jeff Stuart, National Marine Fisheries Service
Nicky Suard, Delta Land and Business owners
Christina Swanson, The Bay Institute
Robert Thornton, Nossaman
Mike Urkov, Tehama-Colusa Canal Authority
Jay Wells, North American Power Sweeping Association
Carl Wilcox, California Department of Fish and Game
Susan William, Pt. Lobos Marine Preserve
Mary Winfree, PoE/USANG
Phil Wyman, Former Central Valley Senator/Assemblyman
Paula Yang, Hmong Sisterhood
Garwin Yip, National Marine Fisheries Service

Appendix E

Biographical Sketches for Members of the Committee on Sustainable Water and Environmental Management in the California Bay-Delta

ROBERT J. HUGGETT, *Chair*, is an independent consultant and professor emeritus and former chair of the Department of Environmental Sciences, Virginia Institute of Marine Sciences at the College of William and Mary, where he was on the faculty for over 20 years. He also served as Professor of Zoology and Vice President for Research and Graduate Studies at Michigan State University from 1997 to 2004. Dr. Huggett is an expert in aquatic biogeochemistry and ecosystem management whose research involved the fate and effects of hazardous substances in aquatic systems. From 1994 to 1997, he was the Assistant Administrator for Research and Development for the U.S. Environmental Protection Agency, where his responsibilities included planning and directing the agency's research program. During his time at the EPA, he served as Vice Chair of the Committee on Environment and Natural Resources and Chair of the Subcommittee on toxic substances and solid wastes, both of the White House Office of Science and Technology Policy. Dr. Huggett founded the EPA Star Competitive Research Grants program and the EPA Star Graduate Fellowship program. He has served on the National Research Council's (NRC) Board on Environmental Studies and Toxicology, the Water Science and Technology Board, and numerous study committees on wide ranging topics. Dr. Huggett earned an M.S. in Marine Chemistry from the Scripps Institution of Oceanography at the University of California at San Diego and completed his Ph.D. in Marine Science at the College of William and Mary.

JAMES J. ANDERSON is a research professor the School of Aquatic and Fisheries Sciences at the University of Washington, where he has been teaching since 1983, and Co-Director of Columbia Basin Research. Prior to joining the faculty at the University of Washington, he did research work at the University of Kyoto in Japan, the National Institute of Oceanography in Indonesia, and Institute of Oceanographic Sciences in Wormley, UK. Dr. Anderson's research focuses on models of ecological and biological processes from a mechanistic perspective, specifically: (1) migration of organisms, (2) decision processes, and (3) mortality processes. For three decades he has studied the effects of hydrosystems and water resource allocations on salmon and other fish species. He has developed computer models of the migration of juvenile and adult salmon through hydrosystems and heads the DART website, an internet database serving real-time environmental and fisheries data on the Columbia River. His other research interests include mathematical studies in ecosystems, biodemography, toxicology and animal behavior. He has served on a number of regional and national panels and has testified numerous times before Congress on the impacts of hydrosystems on fisheries resources. He received his B.S. and Ph.D. in oceanography from the University of Washington.

MICHAEL E. CAMPANA is Professor of Geosciences at Oregon State University, former Director of its Institute for Water and Watersheds, and Emeritus Professor of Earth and Planetary Sciences at the University of New Mexico. Prior to joining OSU in 2006 he held the Albert J. and Mary Jane Black Chair of Hydrogeology and directed the Water Resources Program at the University of New Mexico and was a research hydrologist at the Desert Research Institute and taught in the University of Nevada-Reno's Hydrologic Sciences Program. He has supervised 70 graduate students. His research and interests include hydrophilanthropy, water resources management and policy, communications, transboundary water re-

sources, hydrogeology, and environmental fluid mechanics, and he has published on a variety of topics. Dr. Campana was a Fulbright Scholar to Belize and a Visiting Scientist at Research Institute for Groundwater (Egypt) and the IAEA in Vienna. Central America and the South Caucasus are the current foci of his international work. He has served on six NRC-NAS committees. Dr. Campana is founder, president, and treasurer of the Ann Campana Judge Foundation (www.acjfoundation.org), a 501(c)(3) charitable foundation that funds and undertakes projects related to water, sanitation, and hygiene (WASH) in Central America. He operates the WaterWired blog and Twitter. He earned a BS in geology from the College of William and Mary and MS and PhD degrees in hydrology from the University of Arizona.

THOMAS DUNNE is a professor in the Donald Bren School of Environmental Science and Management at the University of California at Santa Barbara. He is a hydrologist and a geomorphologist, with research interests that include alluvial processes; field and theoretical studies of drainage basin and hillslope evolution; sediment transport and floodplain sedimentation; debris flows and sediment budgets of drainage basins. He served as a member of the WSTB Committee on Water Resources Research and Committee on Opportunities in the Hydrologic Sciences and was elected to the National Academy of Sciences in 1988. He has acted as a scientific advisor to the United Nations, the governments of Brazil, Taiwan, Kenya, Spain, the Philippines, Washington, Oregon, several U.S. federal agencies, and The Environmental Defense Fund. He is a recipient of the American Geophysical Union Horton Award. Dr. Dunne holds a B.A. from Cambridge University and a Ph.D. in geography from the Johns Hopkins University.

ALBERT E. GIORGI is president and senior fisheries scientist at BioAnalysts, Inc in Redmond, WA. He has been conducting research on Pacific Northwest salmonid resources since 1982. Prior to 1982, he was a research scientist with NOAA in Seattle, WA. He specializes in fish passage migratory behavior, juvenile salmon survival studies, biological effects of hydroelectric facilities and operation. His research includes the use of radio telemetry, acoustic tags, and PIT-tag technologies. In addition to his research, he acts as a technical analyst and advisor to public agencies and private parties. He regularly teams with structural and hydraulic engineers in the design and evaluation of fishways and fish bypass systems. He served on the NRC Committee on Water Resources Management, Instream Flows, and Salmon Survival in the Columbia River. He received his B.A. and M.A. in biology from Humboldt State University and his Ph.D. in fisheries from the University of Washington.

PATRICIA M. GLIBERT is a professor at the University of Maryland Center for Environmental Science, Horn Point Laboratory, where she has been on the faculty since 1986. Prior to UMD-HPL, she was a postdoctoral scholar and an assistant scientist at the Woods Hole Oceanographic Institution. Her research areas are in transformations and fate of inorganic and organic nitrogen in marine and estuarine systems; ecology of phytoplankton in coastal and oceanic environments; stable isotope techniques; eutrophication and its effects; growth and physiology of marine cyanobacteria and harmful algal bloom species; "top-down" control of nitrogen cycling; primary productivity and its regulation by environmental factors; and impacts of harmful algae on oysters. Her current projects are in the Chesapeake and coastal bays of Maryland, Florida Bay, and the Arabian Sea. She received her B.S. in biology from Skidmore College; M.S. in earth science from the University of New Hampshire; and her Ph.D. in organismal and evolutionary biology from Harvard University.

CHRISTINE A. KLEIN is the Chesterfield Smith Professor of Law at the University of Florida Levin College of Law, where she has been teaching since 2003. She offers courses on natural resources law, environmental law, water law, and property. Previously, she was a member of the faculty of Michigan State University College of Law, where she served as Environmental Law Program Director. From 1989 to 1993, she was an assistant attorney general in the Office of Colorado Attorney General, Natural Resources Section, where she specialized in water rights litigation. She has published widely on a variety of

water law and natural resources law topics. She holds a B.A. from Middlebury College, Vermont; a J.D. from the University of Colorado School of Law; and an LL.M. from Columbia University School of Law, New York.

SAMUEL N. LUOMA is a research professor at the John Muir Institute of the Environment, University of California, Davis and an emeritus Senior Research Hydrologist in the Water Resources Division of the U.S. Geological Survey, where he worked for 34 years. He also holds an appointment as a Scientific Associate at The Natural History Museum, London. Dr. Luoma's research centers on processes that control the fate, bioavailability and effects of contaminants, particularly in the San Francisco Bay-Delta. He served as the first lead on the CALFED Bay-delta program and is the Editor-in-Chief of San Francisco Estuary & Watershed Science. He has helped refine approaches to determine the toxicity of marine and estuarine sediments and developed models that are used in development of water quality standards. His most recent research interests are in environmental implications of nanotechnology and better connecting water science to water policy. He has served multiple times on the EPA's Science Advisory Board Subcommittee on Sediment Quality Criteria and on other NRC committees. Dr. Luoma received his B.S. and M.S. in Zoology from Montana State University, Bozeman, and his Ph.D. in Marine Biology from the University of Hawaii, Honolulu.

MICHAEL J. MCGUIRE is president and founder of Michael J. McGuire, Inc., in Santa Monica, California. He has provided consulting services over the past 18 years to public water utilities and industries in the areas of Safe Drinking Water Act compliance, source water quality protection and water treatment optimization. Prior to his consulting assignments, he was director of water quality and assistant general manager of the Metropolitan Water District of Southern California. His research interests include control of trace contaminants in drinking water; compliance with the Safe Drinking Water Act and all related regulations; occurrence, chemistry, and control of disinfection by-products; and identification and control of tastes and odors in water supplies. He is currently a member of the Water Science and Technology Board of the National Research Council and was selected as a member of the National Academy of Engineering in 2009. Dr. McGuire received his B.S. in civil engineering from the University of Pennsylvania and M.S. and Ph.D. in environmental engineering from Drexel University in Philadelphia.

THOMAS MILLER is professor of fisheries at the Chesapeake Biological Laboratory, University of Maryland Center for Environmental Science, where he has been teaching since 1994. Prior to UMCES-CBL, he was a postdoctoral fellow at McGill University, Montreal, Canada, and research specialist with the Center for Great Lakes Studies, University of Wisconsin, Milwaukee. His research focuses on population dynamics of aquatic animals, particularly in understanding recruitment, feeding and bio-physical interactions and early life history of fish and crustaceans. He has been involved in the development of a Chesapeake Bay fishery ecosystem plan, which includes detailed background information on fisheries, foodwebs, habitats and monitoring required to develop multispecies stock assessments. Most recently, he has developed an interest in the sub-lethal effects of contamination on Chesapeake Bay living resources using population dynamic approaches. He received his B.Sc. (hons) in human and environmental biology from the University of York, UK; his M.S. in ecology and Ph.D. in zoology and oceanography from North Carolina State University.

JAYANTHA OBEYSEKERA directs the Hydrologic & Environmental Systems Modeling Department at the South Florida Water Management District, where he is a lead member of a modeling team dealing with development and applications of computer simulation models for Kissimmee River restoration and the restoration of the Everglades Ecosystem. Prior to joining the South Florida Water Management District, he taught courses in hydrology and water resources at Colorado State University, Fort Collins; George Washington University, Washington, DC; and at Florida Atlantic University, Boca Raton, Florida. Dr. Obeysekera has published numerous research articles in refereed journals in the field of water resources. Dr. Obeysekera has over 20 years of experience practicing water resources engineering with an

emphasis on both stochastic and deterministic modeling. He has taught short courses on modeling in the Dominican Republic, Colombia, Spain, Sri Lanka, and the U.S. He was a member of the Surface Runoff Committee of the American Geophysical Union and is currently serving as a member of a Federal Task Group on Hydrologic Modeling. He served as member of NRC's Committee on Further Studies of Endangered and Threatened Fishes in the Klamath River. Dr. Obeysekera has a B.S. degree in civil engineering from University of Sri Lanka; M.E. in hydrology from University of Roorkee, India; and Ph.D. in civil engineering with specialization in water resources from Colorado State University.

MAX J. PFEFFER is International Professor of Development Sociology and Chair of the Department at Cornell University. His teaching concentrates on environmental sociology and sociological theory. His research spans several areas including farm labor, rural labor markets, international migration, land use, and environmental planning. The empirical work covers a variety of rural and urban communities, including rural/urban fringe areas. Research sites include rural New York and Central America. He has been awarded competitive grants from the National Institutes of Health, the National Science Foundation, the U.S. Environmental Protection Agency, the U.S. Department of Agriculture's National Research Initiative and its Fund for Rural America, and the Social Science Research Council. Dr. Pfeffer has published a wide range of scholarly articles and has written or co-edited four books. He recently published (with John Schelhas) *Saving Forests, Protecting People? Environmental Conservation in Central America*. He also previously served as the Associate Director of both the Cornell University Agricultural Experiment Station and the Cornell University Center for the Environment. Dr. Pfeffer has served on other NRC committees studying aspects of watershed management. He received his Ph.D. degree in sociology from the University of Wisconsin, Madison.

DENISE J. REED is a University Research Professor at the University of New Orleans and is currently Interim Director of the Ponchartrain Institute for Environmental sciences. Her research interests include coastal marsh response to sea-level rise and how this is affected by human activities. She has worked on coastal issues on the Atlantic, Pacific, and Gulf coasts of the United States, as well as other parts of the world, and has published the results in numerous papers and reports. She is involved in ecosystem restoration planning both in Louisiana and in California. Dr. Reed has served on numerous boards and panels concerning the effects of human alterations on coastal environments and the role of science in guiding ecosystem restoration, including the Chief of Engineers Advisory Board, a number of NRC committees, and the Ecosystem Sciences and Management Working Group of the NOAA Science Advisory Board. She received her B.A. and Ph.D. degrees in geography from the University of Cambridge, United Kingdom.

KENNETH A. ROSE is E.L. Abraham Distinguished Professor in Louisiana Environmental Studies at the Department of Oceanography and Coastal Sciences, Louisiana State University in Baton Rouge. Prior to joining the faculty at LSU in 1998 he was a scientist at Oak Ridge National Laboratory from 1987 to 1998. He also consulted with Martin Marietta Environmental Systems from 1983 to 1987. His research interests include mathematical and simulation models to better understand and forecast the effects of natural and anthropogenic factors on aquatic populations, community food webs, and ecosystems; and use of models in resource management and risk assessment. He is a fellow of the American Association for the Advancement of Science and editor of the *Canadian Journal of Fisheries and Aquatic Sciences*, *Marine and Coastal Fisheries*, and *San Francisco Estuary and Watershed Science*. He received his B.S. from the State University of New York at Albany and his M.S. and Ph.D. in fisheries from the University of Washington.

DESIREE D. TULLOS is assistant professor in the Department of Biological and Ecological Engineering, Oregon State University, Corvallis. Dr. Tullus consulted with Blue Land Water Infrastructure and with Barge, Waggoner, Sumner, and Cannon before joining the faculty at Oregon State University. Her

research areas include ecohydraulics, river morphology and restoration, bioassessment, and habitat and hydraulic modeling. She has done work on investigations of biological responses to restoration and engineered applications in riverine ecosystems; development and evaluation of targeted and appropriate bio-indicators for the assessment of engineered designs in riverine systems; assessing effects of urban and agricultural activities and management practices on aquatic ecosystem stability in developing countries. She received her B.S. in civil engineering from the University of Tennessee, Knoxville, and her M.C.E. in civil engineering and Ph.D. in biological engineering from North Carolina State University, Raleigh.

From: Tom Birmingham
Sent: Friday, July 15, 2016 9:55 AM
To: 'Jeff Sutton'
CC: 'Akroyd, Rebecca'
Subject: RE: Question for the Record and Response

Jeff,

The quote from Huffman was transcribed from the video of the hearing. I checked it twice to ensure its accuracy.

Tom

From: Akroyd, Rebecca [mailto:RAkroyd@kmtg.com]
Sent: Friday, July 15, 2016 9:47 AM
To: 'Jeff Sutton' <jsutton@tccanal.com>
Cc: Tom Birmingham <tbirmingham@westlandswater.org>
Subject: RE: Question for the Record and Response

Jeff,

My redline edits to the draft letter are attached. A clean version of the letter is also attached. In addition, I have attached a final copy of the NAS Report – the page numbers are slightly different from those in the version previously shared.

I was able to cite-check the quotations from the NAS Report, its press release, and the various court decisions. I didn't have access to a transcript of Mr. Huffman's remarks, so wasn't able to check that paragraph.

Thanks
Rebecca



Rebecca R. Akroyd

From: Tom Birmingham [mailto:tbirmingham@westlandswater.org]
Sent: Thursday, July 14, 2016 6:50 PM
To: 'Jeff Sutton'
Cc: 'Weaver, Kiel'; 'Bernhardt, David L.'; Akroyd, Rebecca
Subject: Question for the Record and Response

Jeff,

Attached is a draft question that could be posed to you by Mr. LaMalfa and a draft reply. By copying Rebecca Akroyd on this email, I am requesting that she cite check the letter to ensure the letter accurately quotes the NAS report and the biological opinion judicial decisions. She will forward corrections directly to you.

Thank you to agreeing to handle this matter. I hope the documents are helpful.

Tom

From: Tom Birmingham
Sent: Friday, July 15, 2016 9:56 AM
To: 'Akroyd, Rebecca'
Subject: RE: Question for the Record and Response

Thank you for your quick work on this matter.

From: Akroyd, Rebecca [mailto:RAkroyd@kmtg.com]
Sent: Friday, July 15, 2016 9:47 AM
To: 'Jeff Sutton' <jsutton@tccanal.com>
Cc: Tom Birmingham <tbirmingham@westlandswater.org>
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Tom

From: Jeff Sutton
Sent: Friday, July 15, 2016 10:10 AM
To: 'Tom Birmingham'
CC: 'Akroyd, Rebecca'
Subject: RE: Question for the Record and Response

Thanks so much to you both for the effort on this. I spoke to Kevin Eastman, who was very supportive of the idea and approach . . . he is checking in with Doug . . . and should get back to me soon to confirm that they will be submitting the question.

I will let you know when I get the go ahead, which I am very optimistic is just a formality.

Jeffrey P. Sutton
General Manager
Tehama-Colusa Canal Authority
P.O. Box 1025
Willows, CA 95988
Phone: (530) 934-2125
Cell: (530) [REDACTED]-[REDACTED]

From: Tom Birmingham [mailto:tbirmingham@westlandswater.org]
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To: 'Jeff Sutton'

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Subject: Question for the Record and Response

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From: Johnny Amaral
Sent: Friday, July 15, 2016 3:04 PM
To: David Bernhardt
Subject: How did the phone call go with Watts?

Best,

Johnny Amaral

From: Bernhardt, David L.
Sent: Friday, July 15, 2016 3:09 PM
To: Johnny Amaral
Subject: Re: How did the phone call go with Watts?

He did not have time to talk to me. I will try to talk to him this weekend.

██████████

> On Jul 15, 2016, at 6:04 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:
>
>
>
>
> Best,
>
> Johnny Amaral
>
>

STATEMENT OF CONFIDENTIALITY & DISCLAIMER: The information contained in this email message is attorney privileged and confidential, intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this email is strictly prohibited. If you have received this email in error, please notify us immediately by calling (303)-223-1300 and delete the message. Thank you.

From: Jeff Sutton
Sent: Friday, July 15, 2016 3:24 PM
To: 'Tom Birmingham'
CC: 'Akroyd, Rebecca'
Subject: RE: Question for the Record and Response

Tom and Rebecca,

Just received confirmation from LaMalfa that he would very much like the opportunity to clear up the record on these points, and as such will be posing this question to me to provide follow up testimony.

The Congressman and Eastman are both very appreciate of the efforts, as am I.

Thanks again,

Jeffrey P. Sutton
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Phone: (530) 934-2125
Cell: (530) [REDACTED] - [REDACTED]

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Tom

From: Tom Birmingham
Sent: Friday, July 15, 2016 3:40 PM
To: 'Jeff Sutton'
CC: 'Akroyd, Rebecca'
Subject: RE: Question for the Record and Response

Thank you for your help.

From: Jeff Sutton [mailto:jsutton@tccanal.com]
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From: Tom Birmingham [mailto:tbirmingham@westlandswater.org]
Sent: Friday, July 15, 2016 9:55 AM
To: 'Jeff Sutton'
Cc: 'Akroyd, Rebecca'
Subject: RE: Question for the Record and Response

Jeff,

The quote from Huffman was transcribed from the video of the hearing. I checked it twice to ensure its accuracy.

Tom

From: Akroyd, Rebecca [mailto:RAkroyd@kmtg.com]
Sent: Friday, July 15, 2016 9:47 AM
To: 'Jeff Sutton' <jsutton@tccanal.com>
Cc: Tom Birmingham <tbirmingham@westlandswater.org>
Subject: RE: Question for the Record and Response

Jeff,

My redline edits to the draft letter are attached. A clean version of the letter is also attached. In addition, I have attached a final copy of the NAS Report – the page numbers are slightly different from those in the version previously shared.

I was able to cite-check the quotations from the NAS Report, its press release, and the various court decisions. I didn't have access to a transcript of Mr. Huffman's remarks, so wasn't able to check that paragraph.

Thanks
Rebecca



Rebecca R. Akroyd

From: Tom Birmingham [<mailto:tbirmingham@westlandswater.org>]

Sent: Thursday, July 14, 2016 6:50 PM

To: 'Jeff Sutton'

Cc: 'Weaver, Kiel'; 'Bernhardt, David L.'; Akroyd, Rebecca

Subject: Question for the Record and Response

Jeff,

Attached is a draft question that could be posed to you by Mr. LaMalfa and a draft reply. By copying Rebecca Akroyd on this email, I am requesting that she cite check the letter to ensure the letter accurately quotes the NAS report and the biological opinion judicial decisions. She will forward corrections directly to you.

Thank you to agreeing to handle this matter. I hope the documents are helpful.

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From: Tom Birmingham
Sent: Friday, July 15, 2016 4:37 PM
To: 'Bernhardt, David L.'
CC: 'Jeff Sutton'
Subject: FW: Question for the Record and Response

David,

Mr. LaMalfa is going to ask the question for the record. Please provide any edits to the first paragraph of the letter or other edits you might have directly to Jeff Sutton.

Thank you,
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From: Jeff Sutton [mailto:jsutton@tccanal.com]
Sent: Friday, July 15, 2016 3:24 PM
To: 'Tom Birmingham' <tbirmingham@westlandswater.org>
Cc: 'Akroyd, Rebecca' <RAkroyd@kmtg.com>
Subject: RE: Question for the Record and Response

Tom and Rebecca,

Just received confirmation from LaMalfa that he would very much like the opportunity to clear up the record on these points, and as such will be posing this question to me to provide follow up testimony.

The Congressman and Eastman are both very appreciate of the efforts, as am I.

Thanks again,

Jeffrey P. Sutton
General Manager
Tehama-Colusa Canal Authority
P.O. Box 1025
Willows, CA 95988
Phone: (530) 934-2125
Cell: (530) [REDACTED]-[REDACTED]

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or copy of this email is strictly prohibited. If you have received this email in error, please notify us immediately by calling (303)-223-1300 and delete the message. Thank you.

From: Bernhardt, David L.

Sent: Monday, July 18, 2016 2:54 AM

To: Jeff Sutton

CC: Thomas W. (Tom) Birmingham Esq.

Subject: Questions for the Record and Draft Responses

Attachments: RESPONSESTOQUESTIONSFORTHERECORDJEFFSUTTON.docx

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Respectfully

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**United States House of Representatives Committee on Natural Resources
Subcommittee on Water, Power and Oceans hearing entitled “Changing
Demands and Water Supply Uncertainty in California”**

July 12, 2016

Responses to Questions for the Record to Mr. Jeff Sutton

Question from Representative LaMalfa:

During the July 12, 2016 Subcommittee on Water, Power and Oceans hearing on California Water Supply Under Threat by Conflicting Federal Agencies Ranking Member Jared Huffman made the following statement:

We, the other problem is we keep making the same old claims that have been refuted and debunked time-and-again. One of them is that these biological opinions and the flow parameters that are driven by them are somehow not based on science. Now, I'll ask our witnesses from the Fish and Wildlife Service and the National Marine Fisheries Service quickly about that. These opinions were challenged in court, correct, and they were upheld by the federal courts, correct? Then at the behest of those who have continued to criticize them there was an independent peer review by none other than the National Academy of Science [sic], correct? And they were upheld as being scientifically justified by the highest peer review body in the United States of America, correct? I would hope that we can move beyond continuing to misrepresent the facts on this important issue. . . .

Do you have a response to this comment?

If by this statement Mr. Huffman meant to imply that the science concerning the efficacy of the specific flow parameters “driven” by the biological opinions is settled, he would be wrong. Indeed, the National Academy of Sciences raised significant questions about the scientific underpinnings of these flow parameters.

In the March 19, 2010, National Academy of Sciences press release accompanying release of the report on its review of the biological opinions, the National Academy of Sciences stated:

Most of the actions proposed by two federal agencies to reduce water diversions in the California Bay-Delta in order to protect endangered and threatened fish species are "scientifically justified," but the basis for the specific environmental triggers that would indicate when water diversions should be reduced is less well-supported by scientific analyses, says a

new report from the National Research Council that was requested by Congress and the U.S. Department of the Interior. (Emphasis added.)

Indeed, the National Academy of Sciences report, entitled “A Scientific Assessment of Alternatives for Reducing Water Management Effects On Threatened and Endangered Fishes in California’s Bay Delta,” (“NAS Report”) to which Mr. Huffman referred is replete with criticisms about the scientific basis for the specific flow parameters driven by the biological opinions. For instance, with respect to the action in the 2008 Delta smelt biological opinion to manage the contour line of 2 parts per thousand salinity, called X2, no farther upstream (east) of the Golden Gate Bridge than 74 kilometers in the fall of wet years and 81 kilometers in the fall of moderately wet years, the NAS Report stated:

The controversy about [this Action] arises from the poor and sometimes confounding relationship between indirect measures of delta smelt populations (indices) and X2. Although there is evidence that the position of X2 affects the distribution of smelt, the weak statistical relationship between the location of X2 and the size of smelt populations makes the justification for this action difficult to understand. In addition, although the position of X2 is correlated with the distribution of salinity and turbidity regimes, the relationship of that distribution and smelt abundance indices is unclear. The X2 action is conceptually sound in that to the degree that the amount of habitat available for smelt limits their abundance, the provision of more or better habitat would be helpful. However, the derivation of the details of this action lacks rigor. The action is based on a series of linked statistical analyses (e.g., the relationship of presence/absence data to environmental variables, the relationship of environmental variables to habitat, the relationship of habitat to X2, the relationship of X2 to smelt abundance). Each step of this logical train of relationships is uncertain. The relationships are correlative with substantial variance left unexplained at each step, yet the analyses do not carry the uncertainty at each step to the next step. The action also may have high water requirements and may adversely affect salmon and steelhead under some conditions. NAS Report, at 4 (emphasis added).

This criticism of the scientific basis for imposing an X2 at a particular location during fall months of wet and moderately wet years is particularly relevant to the subject of the Subcommittee’s July 12 hearing because the summer Delta outflow proposal about which the Subcommittee heard testimony is designed to achieve a contour line of 2parts per thousand salinity at a particular location during the summer months.

The criticisms expressed by the NAS Report about the scientific basis for other specific flow parameters and pumping reductions driven by the biological opinions are too numerous to repeat in this letter; however, a few highlights of these criticism are:

The concept of reducing [Old and Middle Rivers] negative flows to reduce mortality of smelt at the [State Water Project] and [Central Valley Project] facilities is scientifically justified. However, there is substantial uncertainty regarding the amount of flow that should trigger a reduction in exports. In other words, the specific choice of the negative flow threshold for initiating the RPA is less clearly supported by scientific analyses.... There clearly is a relationship between negative OMR flows and mortality of smelt at the pumps, but the data do not permit a confident identification of the threshold values to use in the action, and they do not permit a confident assessment of the benefits to the population of the action. NAS Report, at 3-4 (emphasis added).

The historical distribution of smelt on which the relationship with [Old and Middle Rivers] flows was established no longer exists. Delta smelt are now sparsely distributed in the central and southern delta and pump salvage also has been extremely low, less than 4% of the 50-year average index. Since 2005, a significant portion of the remaining smelt population, 42% (Sommer et al., 2009), is in the Cache Slough complex to the north and is therefore largely isolated from the central delta. These changes in the distribution of delta smelt increase the uncertainty surrounding current estimates of the population and its likely response to alterations in delta hydraulics, and until the numbers of smelt rise closer towards the pre-2005 levels, they do not provide a reliable index for incorporation into models for the effects of pumping on smelt salvage.... There clearly is a relationship between OMR flows and salvage rates, but the available data do not permit a confident identification of the threshold values to use in the action, and they do not permit a confident assessment of the benefits to the population of the action. NAS Report at 38-39 (emphasis added).

The controversy [surrounding Action IV.2.1 in the salmonid biological opinion] lies in the effectiveness of the component of this action that reduces water exports from the delta. The effectiveness of reducing exports to improve steelhead smolt survival is less certain, in part because with the VAMP (Vernalis Adaptive Management Plan) increase flows and reduce exports are combined, and in part because steelhead smolts are larger and stronger swimmers than Chinook salmon smolts. Furthermore, it is not clear in the biological opinion how managing exports for this purpose would be integrated with export management for other actions. The choice of a 4:1 ratio of net flows to exports appears to be the result of coordinated discussions among the interested parties. Given the weak influence of exports in all survival relationships (Newman, 2008), continued negotiation offers opportunities to reduce water use in this specific action without great risk to salmon. Further analysis of VAMP data also offers an opportunity to help clarify the issue.

The committee concludes that the rationale for increasing San Joaquin River flows has a stronger foundation than the prescribed action of concurrently managing inflows and exports. NAS Report at 45 (emphasis added).

Again, the criticisms of the scientific methodologies used by the Fish and Wildlife Service and the National Marine Fisheries service to develop the biological opinions and of the specific flow parameters prescribed by the biological opinions are too numerous to repeat here. For your convenience, a copy of the NAS Report is attached, and I urge the Subcommittee to review this report because it belies Mr. Huffman's assertion that the National Academy of Sciences found that the specific flow parameters "driven" by the biological opinions are scientifically justified.

Moreover, it the environmental triggers and the specific flow parameters that are of greatest significance for human uses of the subject water. For example, the Delta smelt biological opinion prescribes that reverse flow in Old and Middle Rivers will be managed during the January 1 – June 30 period at rates between -1250 cubic feet per second and -5000 cubic feet per second. The difference in terms of water supply for the Central Valley Project and the State Water Project between managing reverse flow at -1250 cubic feet per second versus managing reverse flow at -5000 cubic feet per second during this period, in an average hydrologic year, would be more than one-million acre-feet of water. About this action, the NAS Report stated, "there is substantial uncertainty regarding the amount of flow that should trigger a reduction in exports. In other words, the specific choice of the negative flow threshold for initiating the RPA is less clearly supported by scientific analyses," and "the data do not permit a confident identification of the threshold values to use in the action, and they do not permit a confident assessment of the benefits to the population of the action." NAS Report at 3-4.

Mr. Huffman is correct that the biological opinions were upheld by the federal courts. But these courts were not necessarily more kind when assessing the scientific justification for the flow parameters specified by the biological opinions. After lengthy evidentiary hearings concerning the scientific justification for the biological opinions and after reviewing the administrative records for the biological opinions, the United States District Court for the Eastern District of California entered judgments that found the biological opinions were arbitrary and capricious and not supported by the best available science. See *San Luis & Delta-Mendota Water Authority v. Salazar*, 760 F. Supp. 2d 855 (E.D. Cal. 2010) and *Consolidated Salmonid Cases*, 791 F. Supp. 2d 802 (E.D. Cal. 2011). In its decisions, the District Court was highly critical of the science on which the Fish and Wildlife and the National Marine Fisheries Service relied in preparing the biological opinions. See *San Luis & Delta-Mendota Water Authority v. Salazar*, 760 F. Supp. 2d at 885, 890, 895, 913 and 922. See also *Consolidated Salmonid Cases*, 791 F. Supp. 2d at 827, 858, 898 and 909. The District Court's judgments were reversed by the United States Court of Appeals for the Ninth Circuit, but not necessarily because the appellate court disagreed with the District Court's findings. Rather the Ninth Circuit Court of Appeals found that the District Court had improperly substituted its own judgment for that of the agency biologists who had prepared the biological

opinions, who are entitled to deference. See *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 620-626 (9th Cir. 2014); see also *San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971, 996 (9th Cir. 2014). Indeed, with respect to the Delta smelt biological opinion, the Ninth Circuit Court of Appeals characterized the biological opinion as a “bit of a mess. And not just a little bit of a mess, but, at more than 400 pages, a big bit of a mess.” *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d at 604.

One portion of the Ninth Circuit Court of Appeals’ decisions that Mr. Huffman does not highlight is that portion of the decision which suggests it is up to Congress to address the issues that created by these biological opinions. In its decision related to the Delta smelt biological opinion, the appellate court stated:

We recognize the enormous practical implications of this decision. But the consequences were prescribed when Congress determined that “these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. § 1531(a)(3). As the Supreme Court observed in *Tennessee Valley Authority v. Hill*: “It may seem curious to some that the survival of a relatively small number of three-inch fish ... would require the permanent halting of a virtually completed dam,” but “the explicit provisions of the Endangered Species Act require precisely that result.” 437 U.S. 153, 172–73, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). Such species have been “afforded the highest of priorities,” by Congress, even if it means “the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds.” *Id.* at 174, 98 S.Ct. 2279 (footnote omitted). The law prohibits us from making “such fine utilitarian calculations” to balance the smelt’s interests against the interests of the citizens of California. *Id.* at 187, 98 S.Ct. 2279. Consequently, any other “[r]esolution of these fundamental policy questions” about the allocation of water resources in California “lies ... with Congress and the agencies to which Congress has delegated authority, as well as with state legislatures and, ultimately, the populace as a whole.” *Baltimore Gas & Elec.*, 462 U.S. at 97, 103 S.Ct. 2246.

It is for the reasons stated by the Ninth Circuit Court of Appeals, that the resolution of fundamental policy questions about the allocation of water resources lies with Congress, that the Tehama-Colusa Canal Authority has supported efforts by Members of the House of Representatives to enact legislation that would provide a more reasonable balance between implementation of the biological opinions and water supplies.

[INSERT ADDITIONAL QUESTIONS FOR THE RECORD AND RESPONSES IF ANY]

From: Jeff Sutton
Sent: Monday, July 18, 2016 11:40 AM
To: 'Bernhardt, David L.'
CC: 'Thomas W. (Tom) Birmingham Esq.'
Subject: RE: Questions for the Record and Draft Responses

Thanks so much David, this is very helpful.

Jeffrey P. Sutton
General Manager
Tehama-Colusa Canal Authority
P.O. Box 1025
Willows, CA 95988
Phone: (530) 934-2125
Cell: (530) [REDACTED]

From: Bernhardt, David L. [mailto:DBernhardt@BHFS.com]
Sent: Monday, July 18, 2016 2:54 AM
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From: Cannon Michael
Sent: Monday, July 18, 2016 8:55 PM
To: Johnny Amaral
CC: Dennis A. Cardoza; David Longly Bernhardt; Nancy E Williams; Joe Raeder
Subject: Signatures

I wanted to get your opinions on the letter signing process.

We could use one of the online signing services to get high numbers of signatories.

We are currently collecting "wet" signatures to use like we did on the last letter.

Or we could do both methods.

Any thoughts?

Do the mass signature online letters have the same impact as the signed letters? I was just wondering what you all thought since you have more of the pulse of the electeds and understanding.

Let me know your thoughts on the approach. Thank you.

Sincerely,

Cannon Michael
Bowles Farming Company
209-752-7792 (Direct)
www.bfarm.com
@agleader

Please consider the Environment before printing this email.

=====

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=====

From: Nancy Williams
Sent: Tuesday, July 19, 2016 5:42 AM
To: 'Cannon Michael'; 'Johnny Amaral'
CC: 'Dennis A. Cardoza'; 'David Longly Bernhardt'; 'Joe Raeder'
Subject: RE: Signatures

Cannon –

For my part, I'm not sure the additional effort to do the "wet" signatures adds enough benefit to make it worth it. It always does "look" more engaged, if you will – but it does take a lot of work. A long list of signatories in a typed list also has a strong impact.

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Cc: Dennis A. Cardoza <dcardoza@foley.com>; David Longly Bernhardt <dbernhardt@bhfs.com>; Nancy E Williams <nwilliams@swaconsult.com>; Joe Raeder <JRaeder@tfgnet.com>
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Sent: Tuesday, July 19, 2016 6:10 AM
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CC: Dennis A. Cardoza; David Longly Bernhardt; Joe Raeder
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Maybe the joint approach makes the most sense.

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Bowles Farming Company, Inc.
209-769-6777
www.bfarm.com
@agleader

On Tue, Jul 19, 2016 at 5:36 AM -0700, "Nancy Williams" <nwilliams@swaconsult.com> wrote:

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From: DCardoza@foley.com
Sent: Tuesday, July 19, 2016 7:16 AM
To: Cannon Michael
CC: Nancy Williams; Johnny Amaral; David Longly Bernhardt; Joe Raeder
Subject: Re: Signatures

Agree

Sent from my iPhone

Please excuse any auto correct errors

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Sent: Monday, July 18, 2016 11:55 PM
To: Johnny Amaral <jamaral@westlandswater.org<<mailto:jamaral@westlandswater.org>>>
Cc: Dennis A. Cardoza <dcardoza@foley.com<<mailto:dcardoza@foley.com>>>; David Longly Bernhardt <dbernhardt@bhfs.com<<mailto:dbernhardt@bhfs.com>>>; Nancy E Williams <nwilliams@swaconsult.com<<mailto:nwilliams@swaconsult.com>>>; Joe Raeder <JRaeder@tfgnet.com<<mailto:JRaeder@tfgnet.com>>>
Subject: Signatures

I wanted to get your opinions on the letter signing process.

We could use one of the online signing services to get high numbers of signatories.

We are currently collecting "wet" signatures to use like we did on the last letter.

Or we could do both methods.

Any thoughts?

Do the mass signature online letters have the same impact as the signed letters? I was just wondering what you all thought since you have more of the pulse of the electeds and understanding.

Let me know your thoughts on the approach. Thank you.

Sincerely,

Cannon Michael

Bowles Farming Company

209-752-7792 (Direct)

www.bfarm.com<https://urldefense.proofpoint.com/v2/url?u=http-3A_www.bfarm.com&d=CwMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkjCNM24pCPMnJRMu5cnOh9t0O7w&m=ATa30bInRjIuGH3O65UInjkaxzfTvi1a5roUYz7sRlo&s=2Koz7xygaLeoAhW98UZt1cG5v0WUGnZjFDyAAJLNAI&e=

>

@agleader<https://urldefense.proofpoint.com/v2/url?u=https-3A_twitter.com_agleader&d=CwMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkjCNM24pCPMnJRMu5cnOh9t0O7w&m=ATa30bInRjIuGH3O65UInjkaxzfTvi1a5roUYz7sRlo&s=7_0SF06ong8uJCypkhpYN0vDVT0BsneQ0yNm8lWVLwU&e=

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=====

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From: Karen Clark
Sent: Wednesday, July 20, 2016 12:31 PM
To: Dan Errotabere
Subject: David L. Bernhardt
Attachments: David L. Bernhardt.vcf; Untitled attachment 37929.txt

Hi Dan,

Here is David's contact info.

BEGIN:VCARD
VERSION:3.0
PRODID:-//Apple Inc.//iPhone OS 9.3.2//EN
N:Bernhardt;David;L.;;
FN: David L. Bernhardt
EMAIL;type=INTERNET;type=pref:DBernhardt@BHFS.com
TEL;type=CELL;type=VOICE;type=pref:1 (202) [REDACTED]-[REDACTED]
END:VCARD

Sent from my iPhone

From: Daniel Errotabere
Sent: Wednesday, July 20, 2016 12:57 PM
To: 'Karen Clark'
Subject: RE: David L. Bernhardt

Thanks Karen

Daniel Errotabere
[REDACTED]
Riverdale, California 93656
Telephone: (559) [REDACTED] - [REDACTED]

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-----Original Message-----

From: Karen Clark [<mailto:kclark@westlandswater.org>]
Sent: 7/20/2016 12:31 PM
To: Dan Errotabere <[REDACTED]@[REDACTED]>
Subject: David L. Bernhardt

Hi Dan,

Here is David's contact info.

From: Jason Peltier

Sent: Thursday, July 21, 2016 5:49 PM

To: Dennis Cardoza; David Bernhardt; Ed Manning; Carolyn Jensen; Johnny Amaral; Ara Azhderian

Subject: Fwd: Signed CPOU petition

Attachments: 7-21-16 Memo to Nancy Quan (DWR) & Pablo Arroyave (USBR).pdf

Temporary relief.

Begin forwarded message:

From: "ARROYAVE, PABLO" <parroyave@usbr.gov>

To: "Alicia Forsythe" <aforsythe@usbr.gov>, "ckao@valleywater.org"

<ckao@valleywater.org>, "Frances Mizuno" <frances.mizuno@sldmwa.org>, "Jason Peltier"

<jason.peltier@sldmwa.org>, "Michael Jackson" <mjackson@usbr.gov>, "Michael Lebarre"

<mlebarre@usbr.gov>, "RICHARD WOODLEY" <rwoodley@usbr.gov>, "RICHARD

STEVENSON" <rstevenson@usbr.gov>, "RUFINO GONZALEZ" <RGonzalez@usbr.gov>, "Steve Chedester"

<stevechedester@sjrecwa.net>, "Chadwick Moore" <cmoore@usbr.gov>, "Christopher White"

<cwhite@ccidwater.org>, "Garth Hall" <ghall@valleywater.org>, "Mario

Manzo" <mmanzo@usbr.gov>, "Tracey Rosin" <trosin@ccidwater.org>, "Traci Michel"

<tmichel@usbr.gov>, "Ronald Milligan" <rmilligan@usbr.gov>, "Jason R. Phillips"

<jphillips@friantwater.org>, "Dan Vink" <dvink@svwater.org>, "David Orth"

<dorth@davidorthconsulting.com>, "Tom Johnson" <trjllc@zetabroadband.com>

Subject: Signed CPOU petition

All:

Please see the attached.

Thanks,

Pablo R. Arroyave
Deputy Regional Director
Bureau of Reclamation
Mid-Pacific Region
2800 Cottage Way
Sacramento, CA 95825
Tel: (916) 978-5013



State Water Resources Control Board

TO: Nancy Quan
Department of Water Resources
nancy.quan@water.ca.gov

Pablo Arroyave
Deputy Regional Director
United States Bureau of Reclamation
Mid-Pacific Region
parroyave@usbr.gov

FROM: 
Thomas Howard
Executive Director

DATE: July 21, 2016

SUBJECT: REQUEST FOR ADDITIONAL EXCHANGE OF WATER PURSUANT TO
DIVISION OF WATER RIGHTS MAY 17, 2016 ORDER APPROVING
CONSOLIDATED PLACE OF USE UNDER SPECIFIED PERMITS OF THE
STATE WATER PROJECT AND CENTRAL VALLEY PROJECT (2016 CPOU
ORDER)

On May 17, 2016, the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), issued an Order (2016 CPOU Order) approving a petition¹ from the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Reclamation) requesting temporary changes in the place of use of water rights of the State Water Project (SWP) and Central Valley Project (CVP). The 2016 CPOU Order temporarily approved a consolidated place of use for DWR's SWP with Reclamation's CVP allowing for transfer/exchange of water for several projects that were approved in the original petition. Section 8.0 of the 2016 CPOU Order denied one transfer/exchange (KTWD Exchange) without prejudice on the grounds that there was insufficient information to determine whether the exchange would be from stored water.

¹ The petition was filed for Permit 16479 (Application 14443) of the Department of Water Resources' State Water Project and License 1986 and Permits 11885, 11886, 12721, 11967, 11887, 12722, 12723, 12727, 11315, 11316, 11968, 11969, 12860, 11971, 11973 and 12364 (Applications 23, 234, 1465, 5626, 5628, 5638, 9363, 9364, 9368, 13370, 13371, 15374, 15375, 15764, 16767, 17374 and 17376, respectively) of the United States Bureau of Reclamation's Central Valley Project.

Condition 5 of the 2016 CPOU Order provides a process for DWR and Reclamation to request the approval of transfers/exchanges not specifically identified in the petition. In addition, Condition 5 generally applies to the proposed KTWD exchange that was denied for failure to provide sufficient information to support the findings required for approval. The Condition 5 process authorizes additional exchanges under the 2016 CPOU, if the proposed transfer/exchange meets certain criteria, including:

- a) The total quantity of water delivered to any SWP or CVP contractor shall not exceed historic average deliveries to the contractor as stated in the attachments provided with the petition for change.
- b) Transfers or exchanges shall not result in the net decrease of San Joaquin River or Sacramento River flow over the period of the transfer. The transfer or exchange will not result in an increase in saline drainage to the San Joaquin River.
- c) Transfers or exchanges shall not result in any increase in the amount of water diverted from the Delta. The water to be exchanged is part of any available Project allocations, water currently stored in San Luis Reservoir, or previously placed in groundwater storage south of the Delta. Further, the water to be exchanged or transferred would have been consumptively used or stored in the absence of the transfer.

On July 20, 2016, Reclamation submitted a request to the Division pursuant to Condition 5 of the 2016 CPOU Order. Reclamation's request is based on additional exchanges requested by the Kern County Water Agency (KCWA), Arvin Edison Water Storage District (AEWSD) and Reclamation to be made consistent with the provisions contained in Condition 5 of the 2016 CPOU Order. Inasmuch as the 2016 CPOU Order approved the then requested exchanges minus the amount requested for the denied exchange, DWR and Reclamation request that this cap be increased to 307,900 acre-feet (af) of water and that the proposed transfer from AEWSD to the Exchange Contractors and exchange of KCWA SWP water for a like amount of CVP in Millerton Lake be approved. Essentially, the petition asks that the proposed KCWA exchange be treated like the KTWD Exchange and the cap adjusted accordingly.

Kern County Water Agency Proposed Exchange

KCWA proposes to exchange up to 45,000 af of its SWP water in San Luis Reservoir for a like amount of Reclamation's CVP Friant-Kern Division (Friant) water in Millerton Lake. The SWP exchanged water would be released from San Luis Reservoir and delivered to the San Joaquin River Exchange Contractors (Exchange Contractors) via the Delta-Mendota Canal outside of the State Water Project place of use. Under the exchange, an amount of previously stored CVP Friant water equivalent to the quantity delivered to Reclamation plus 10 percent (a total of 50,000 af) will be released from Millerton Lake into the Friant-Kern Canal for delivery to KCWA through existing turnouts including the Friant-Kern Canal Intertie to the Cross Valley Canal. Water delivered to the Cross Valley Canal will then be delivered to existing turnouts and the California Aqueduct to KCWA Member Units.

Section 8 of the State Water Board's May 17 Order denied approval of a similar exchange between KTWD and the Exchange Contractors for failure to show at that time that the water to be released from Friant Dam in the absence of the exchange would have been released from storage rather than bypassed natural flows. The Order denied that portion of the petition

without prejudice, recognizing that DWR and Reclamation could in the future support the request with additional information demonstrating that the proposed exchange would only involve stored water released from Friant Dam. The Order also specifically anticipates additional south-of-Delta transfers/exchanges not identified in the Order. The amount of the previously denied exchange between KTWD and the Exchange Contractors was up to 47,920 af and, as stated above, Reclamation identifies in its request that the CVP Friant water that is part of the proposed exchange is previously stored CVP Friant water.

Arvin Edison Water Storage District Short Term Exchange

AEWSD proposes to deliver 12,000 af of water currently stored in San Luis Reservoir to Reclamation for delivery to the Exchange Contractors. The water will be returned to AEWSD by the end of February 2017. The 12,000 af proposed for the exchange is a portion of the amount of water originally described in the 2016 CPOU Order.

Reclamation has indicated that the proposed exchange meets all criteria identified under Condition 5 of the 2016 CPOU Order, other than the total quantity-limit summed from the approved transfers identified in Condition 4, as described below:

1. The transfer will not result in an increase in water diverted from the Delta. DWR and Reclamation operations in the Delta will not change as a result of the proposed exchange. All the water proposed for exchange is already in storage downstream of the Delta or previously stored in Millerton Reservoir. There will be no change in inflow to or export from the Delta as a result of the proposed exchange.
2. The quantity of the exchange will not exceed the amount of SWP water currently scheduled for delivery to KCWA or AEWSD. No change in SWP or CVP allocations will be made.
3. The purpose of the exchange is to help address critical CVP water supply shortages in San Luis Reservoir due to the severe restrictions on Delta exports at Jones. CVP allocations were severely restricted in 2016. All the water to be provided through the exchange is water already diverted to storage. There will be no change in the amount of water allocated to any contractor no additional water diverted to storage at any SWP or CVP facility. All the water would have been consumptively used or stored in the absence of the transfer.
4. The total quantity of water delivered to SWP or CVP contractors as a result of the change will not exceed historic average deliveries. CVP water supplies are critically short in 2016. There will be no increase in allocation to any CVP contractors as a result of the exchange.
5. The exchange will not result in a net loss of San Joaquin River or Sacramento River flows. The water stored in Millerton Reservoir to be delivered to KCWA is water previously stored under Reclamation's Friant water rights. The Friant water is water that would otherwise have been delivered to the Exchange Contractors or remained in storage in Millerton Reservoir.
6. The exchange will not result in an increase in saline drainage to the San Joaquin River. There will be no increase in the amount of water delivered to the Exchange contractors as a result of the exchanges. There is no return flow to the San Joaquin River from KCWA.
7. Section 8 of the SWRCB's May 17 Order denied approval of a similar exchange between KTWD and the Exchange Contractors on the basis that "(I)t is uncertain whether the water that would be released from Friant Dam in the absence of the exchange would have been released

from storage rather than bypassed natural flows." The Order went on to state "(I)f the Petitioners can provide additional information to support that the proposed exchange between KTWD and the Exchange Contractors would only involve stored water released from Friant Dam, the Deputy Director for Water Rights will consider the proposed exchange between KTWD and the Exchange Contractors under the additional south-of-Delta transfer/exchange process identified in Condition 5 of the Order ." The amount of this exchange was up to 47,920 af; however Reclamation's current exchange request is 50,000 af.

8. As noted above, the water provided to the Exchange Contractors in the absence of this exchange will be water previously stored in Millerton Reservoir pursuant to Reclamation's Friant Division water rights (License 1986; Permits 11885 and 11886).

Approval of Condition 5 Request

Pursuant to Condition 5 of the 2016 CPOU Order, the exchanges as described above are approved.

The authorized amount of transfers and exchanges approved pursuant to the 2016 CPOU Order is 257,900 af, which is equal to the sum of the approved transfers and exchanges per the original petition as identified in Condition 4 of the Order. It is clear from the discussion at section 8 of the Order that the 257,900 af sum in Condition 4 was based on the petitioners' failure to provide sufficient information related to the KTWD Exchange showing that the water to be released from Friant Dam in the absence of the exchange would have been released from storage rather than bypassed natural flows. The 2016 CPOU Order's denial of the KTWD was without prejudice and clearly left open the possibility that "[i]f the Petitioners can provide additional information to support that the proposed exchange between KTWD and the Exchange Contractors would only involve stored water released from Friant Dam, the Deputy Director for Water Rights will consider the proposed exchange between KTWD and the Exchange Contractors under the additional south-of-Delta transfer/exchange process identified in Condition 5." (Order, p. 14.) Reclamation's Millerton Lake Daily Operations Report for July 20, 2016, shows that the natural San Joaquin River flow was 658 cubic feet per second (cfs), inflow to Millerton Lake was 1,769 cfs and total releases from Friant Dam were 4,087 cfs. Therefore, the releases from Friant Dam constitute withdrawal from storage; this allows the KTWD Exchange to meet the conditions of the 2016 CPOU Order.

In reviewing Condition 5, it appears that the intent was to establish general conditions for other south-of-Delta approvals beyond those discussed in the 2016 CPOU Order, but the total cap on transfers was not to apply to exchange/transfers discussed in the order. Otherwise, the denial without prejudice in Section 8.0 would be meaningless. Even if petitioners cured the defects described in Section 8.0, they would not be able to avail themselves of the transfer because of the hard cap in Condition 4. As a result, it makes sense to construe the Condition 4 cap as applying to approvals generally, but not as a limitation on an exchange/transfer that attempts to satisfy the failings identified in Section 8.0.

Inasmuch as the sum total of the approved transfers/exchanges did not include the at-that-time denied exchange, it is reasonable to conclude that had the petitioners adequately supported that exchange, the sum total of the approved transfers/exchanges would have been the requested amount. Because the present request meets all other criteria identified in Condition 5 and is in other pertinent respects similar to the previously denied request but is supported by the

previously lacking information, it is reasonable to approve the present request for a south-of-Delta KCWA exchange and modify the transfer/exchange sum total accordingly.

If you require further assistance, please contact Kathryn Gaffney at (916) 341-5360 or by email at Kathryn.Gaffney@waterboards.ca.gov. Written correspondence or inquiries should be addressed as follows: State Water Resources Control Board, Division of Water Rights, Attn: Kathryn Gaffney, P.O. Box 2000, Sacramento, CA, 95812-2000.

ec:

Maureen Sergent
Department of Water Resources
maureen.sergent@water.ca.gov

James Mizell
Department of Water Resources
james.mizell@water.ca.gov

Ray Sahlberg
U.S. Bureau of Reclamation
rsahlberg@usbr.gov

From: Johnny Amaral
Sent: Friday, July 22, 2016 9:28 AM
To: Tom Birmingham
CC: David Bernhardt; Ryan A. ' 'Smith
Subject: Fwd: Emailing - Correspondence from Jared Huffman 6-24-16.pdf
Attachments: Correspondence from Jared Huffman 6-24-16.pdf; Untitled attachment 01525.htm

David and Ryan. FYI

Best,

Johnny Amaral

Begin forwarded message:

From: "Bobbie Ormonde" <bormonde@westlandswater.org>
To: "Tom Birmingham" <tbirmingham@westlandswater.org>
Cc: "'Dan Pope'" <dpope@westlandswater.org>, "'Philip Williams'" <pwilliams@westlandswater.org>, "'Johnny Amaral'" <jamaral@westlandswater.org>
Subject: Emailing - Correspondence from Jared Huffman 6-24-16.pdf

Tom,

The attached correspondence from Jared Huffman was received this morning via the U. S. Postal Service.

Bobbie Ormonde
Director of Finance and Administration
Westlands Water District
3130 N. Fresno Street
Fresno, CA 93703-6056
(559) 241-6203

JARED HUFFMAN
2ND DISTRICT, CALIFORNIA

COMMITTEE ON
NATURAL RESOURCES
WATER, POWER, AND OCEANS – RANKING MEMBER
FEDERAL LANDS
COMMITTEE ON TRANSPORTATION
AND INFRASTRUCTURE
HIGHWAYS AND TRANSIT
WATER RESOURCES AND ENVIRONMENT

Congress of the United States
House of Representatives
Washington, DC 20515–0502

WASHINGTON OFFICE
1630 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
PHONE: (202) 225-5161
FAX: (202) 225-5163
WEBSITE: huffman.house.gov

June 24, 2016

Tom Birmingham
General Manager
Westlands Water District
3130 N. Fresno Street
P.O. Box 6056
Fresno, CA 93703-6056

Dear Mr. Birmingham:

The Hoopa Valley Tribe has identified several questions and concerns about legislation being considered for the San Luis drainage agreements. This legislation would have significant effects on the Trinity River, which is a critical resource for the tribe and other tribes, commercial and sport fishermen along the Northern California coast.

My office has submitted the tribe's testimony and concerns into the record. I ask that you give my constituents' attached letter your full and fair consideration, and reply to their questions.

Thank you for your attention to this important issue.

Sincerely,



JARED HUFFMAN

Member of Congress

SAN RAFAEL
999 FIFTH AVENUE, SUITE 280
SAN RAFAEL, CA 94901
PHONE: (415) 258-9857
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FORT BRAGG
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EUREKA, CA 95501
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FAX: (707) 407-3559



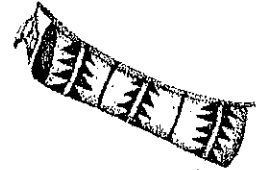
HOOPA VALLEY TRIBAL COUNCIL

Hoopa Valley Tribe

Post Office Box 1348 Hoopa, California 95546

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Chairman Ryan Jackson

**U.S. House of Representatives
Natural Resources Committee
Subcommittee on Water, Power and Oceans
114th Cong., 2nd Session
Legislative Hearing on Water Settlements
May 24, 2016**

**Statement of Ryan Jackson, Chairman, Hoopa Valley Tribe of Northern California
On the Relationship of H.R. 4366 and 5217, San Luis Unit Drainage Resolution Act,
To Unfulfilled Federal Tribal Trust Responsibilities and other Legal Obligations for Trinity River
Fish, Wildlife, and Water Supplies.**

Chairman Fleming, Ranking Member Huffman, and Members of the Subcommittee on Water, Power and Oceans, as Chairman of the Hoopa Valley Tribe of Northern California, I appreciate the opportunity to submit my written testimony on H.R. 4366 and H.R. 5217, legislation regarding the San Luis Unit of the Central Valley Project (CVP). I am disappointed to report that these bills and the settlements that they would approve, as with others in which the Obama Administration has been involved in the Klamath and Trinity rivers, ignore or set aside the United States' senior trust obligations and priorities under reclamation law for the water and fishery that the United States holds in trust for the Hoopa Valley Tribe. The settlements are based on disabling conflicts of interest between the federal fiduciary obligations for our Tribe's vested property rights and Bureau of Reclamation program interests. They also violate the Obama Administration's commitments to federal trust responsibilities in Executive Order 13175 and Secretarial Order 3335. Our Tribe strongly opposes both bills in their present form and urges the Subcommittee to amend them as proposed in this testimony.

H.R. 4366 and H.R. 5217 would approve settlements approved by the Obama Administration that were reached following court rulings that the federal government is financially liable to certain CVP contractors for mismanagement of its reclamation responsibilities.

Our rights in the Trinity River and the federal obligations to our Tribe in operating the Central Valley Project are clearly involved and adversely affected by the settlements. Please be assured that our Tribe is not coming before this Committee at the last minute to raise its objections. Since news of a drainage settlement for the San Luis Unit first emerged several years ago the Hoopa Valley Tribe has brought its concerns to the Secretary of the Interior, the Bureau of Reclamation and the Committees of Congress on numerous occasions. I have met personally with many members of this Subcommittee and your staff.

Moreover, the prior rights and interests of our Tribe in Trinity River Division water that serves the San Luis Unit, and which is a key component of the proposed settlements, are also well known to the contractors who will benefit from the settlements. For decades, they have been relentless,

implacable adversaries of our Tribe. Those contractors have suits pending against our rights in Trinity Division water in the federal district court and court of appeals. Yet neither the settlements nor H.R. 4366 or H.R. 5217 require dismissal of that litigation. This violates the Administration's policy of certainty and finality in water rights settlements. Nor do the settlements comport with the directives in Natural Resources Committee Chairman Rob Bishop's February 26, 2015 letter to the Attorney General and Secretary of the Interior regarding Indian water settlements. No less should be expected in reclamation water settlements than what this Committee requires in Indian water settlements. Our people have suffered grievously--economically, socially and culturally--from the damage to our fishery caused by the diversion of our water. We have bent under the burden of the San Luis Unit contractors' assaults and the actions of our trustee, but we will not break.

More than a decade ago when the San Luis Unit contractors sued to enjoin the Trinity River Restoration Program that put an end to severe over-diversion of Trinity River water to the San Luis Unit, Senator Dianne Feinstein convened our Tribe and the contractors, some of whose representatives appear before this Subcommittee today, to facilitate settlement discussions. In the course of those discussions, which eventually concluded following a court of appeals ruling in the Tribe's favor against the San Luis Unit contractors, Senator Feinstein congratulated our Tribe on our stewardship of the Trinity River. We offer this testimony today as that steward and as owner of vested property rights that are senior to any interest that the San Luis Unit contractors may claim. It would be unconscionable, a national tragedy, and a grievous breach of trust for the Congress and the Administration today to proceed with these settlements in derogation of our rights.

I request that these bills not be enacted until the Obama Administration and this Subcommittee conform the settlements with the United States' trust obligations to the Hoopa Valley Tribe, and the principles of Executive Order 13175 and Secretarial Order 3335. To support my testimony, I have attached: (1) an October 2015 White Paper prepared by the Tribe on the integral relationship between the CVP's Trinity River Division and San Luis Unit and previously furnished to members of the Subcommittee; (2) a proposed Title II to H.R. 4366 and H.R. 5217; and (3) a map depicting the relationship of the Trinity River Division and Hoopa Valley Reservation to the San Luis Unit.

The lower twelve miles of the Trinity River and a portion of the Klamath River flow through the Hoopa Valley Reservation. Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have been the mainstay of the life and culture of the Hoopa Valley Tribe. The requirements to manage federal agency actions to provide habitat and sufficient water to protect salmon populations, and correspondingly, the Tribe's livelihood, have been well known since the Hoopa Valley Reservation was created and the Tribe's federally-reserved fishing right was secured in 1864. The fishery was "not much less necessary to the existence of the Indians than the atmosphere they breathed." Blake v. Arnett, 663 F.2d 906, 909 (9th Cir. 1981) (quoting United States v. Winans, 198 U.S. 371, 381 (1905)). The Hoopa Valley Tribe follows exacting cultural practices to protect individual runs of fish and to celebrate the bounty of the river that gives life to their people. The salmon fishery also holds significant value in the Tribe's culture and economy, and the Tribe holds property rights in the Trinity River Basin fishery. See Mem. from John D. Leshy, Solicitor of the Department of the Interior to the Secretary of the Interior 3, 15, 18-21 (Oct. 4, 1993), cited with approval, Parravano v. Babbitt, 70 F.3d 539, 542 (9th Cir. 1995), cert. denied, 518 U.S. 1016 (1996).

The CVP, mainly the San Luis Unit, has a direct and dramatic effect on fisheries reserved for the Tribe. The CVP's Trinity River Division diverts water from the Klamath-Trinity River Basin by means

24 May 2014

Statement of Ryan Jackson, Chairman, Hoopa Valley Tribe of Northern California

of a system of dams and trans-mountain diversion works; it is the only source of imported water to the CVP. By the Act of August 12, 1955 ("1955 Act"), 69 Stat. 719, Pub. L. 84-386 (authorizing construction and operation of the TRD), water and power developed by the Trinity River Division became part of the supply available to satisfy CVP water service delivery contracts. As demonstrated in Attachment 1, the San Luis Unit was authorized in 1963 as a direct beneficiary of the Trinity River Division. All water deliveries to the San Luis Unit and any settlement of San Luis Unit claims are subject to the priorities in 1955 Act that first and foremost protect the Trinity River fishery and Trinity basin economy. H.R. 4366 and H.R. 5217 are before this Subcommittee because the Bureau of Reclamation and the San Luis Unit contractors have turned one of California's most pristine water sources into a toxic environmental hazard that affects millions of Californians. The Tribe must not be a victim of the destructive remedies that the Administration and San Luis Unit contractors have fashioned for themselves in these settlements.

Congress authorized the Trinity River Division after being advised that approximately 50% of the Trinity's flow would be diverted and that the balance of the Trinity's flow would remain in the Trinity-Klamath River system and basin. In section 2 of the 1955 Act, Congress expressly made diversion to the Central Valley subject to requirements for fish and wildlife preservation and propagation in the Klamath-Trinity River Basin. However, upon completion of the Trinity River Division in 1964, up to 90% of the Trinity's flow was diverted (Trinity River Flow Study (1999) (TRFEFR) at 8, 63-64) and within two decades, a corresponding 90% decline of the Trinity's fish populations resulted. The diversions also altered the native riparian vegetation, eliminated traditional fishing sites on the Hoopa Valley Reservation that were passed down from generation-to-generation for thousands of years, changed the River's uses within the Hoopa Valley community by the Tribe and its members, and resulted in excessive federal management of all aspects of Tribal life and resource management activities. Decades of diversions have increased algae growth in the Trinity River leading to fouling of fish nets and further limiting full opportunities of Hoopa Tribal members to exercise their reserved fishing rights. Hoopa fishing rights have also been degraded by mismanagement of the Trinity River Hatchery, including failure to integrate a natural and hatchery stock management approach for recovering and restoring ESA listed Coho salmon.

Fishery studies throughout the late 1970s and early 1980s determined that the operation of the Trinity River Division was the single greatest contributor to the Trinity fishery declines. The devastating effects on the anadromous fishery resulted in listing of Klamath-Trinity Coho salmon under both state and federal Endangered Species Acts.

Mismanagement of the Trinity River Division's hatchery whose purpose is to compensate for loss of habitat upstream of Trinity River Division dams has resulted in lawsuits which further threaten to degrade the Tribe's reserved fishing rights. See EPIC v. Department of the Interior Court settlement, 28 May 2014, United States District Court (N.D. Cal.), Case No. 13-02293-MMC.

After discovering the impacts of the Trinity River Division upon the Trinity fishery, Congress has passed a number of laws intended to restore the fishery, including: the Trinity River Basin Fish and Wildlife Management Act, Pub. L. 98-541, 98 Stat. 2721 (1984), the Trinity River Basin Fish and Wildlife Management Reauthorization Act, Pub. L. 104-143, 110 Stat. 1338 (1996), and section 3406(b)(23) of the Central Valley Project Improvement Act (CVPIA) (Public Law 102-575, (1992)). In particular, CVPIA § 3406(b)(23) directed the Secretary to determine and, upon concurrence of the Tribe, implement permanent in-stream fishery flow requirements and operating criteria and

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procedures for the Trinity River Division to restore and maintain the Trinity River fishery at levels that existed prior to construction of the Trinity River Division. This provision was one of many Congress added to the CVP authorizing legislation in the CVPIA in conjunction with that Act's clarification that the CVP be operated for the purposes of protecting fishery resources, mitigating fish and wildlife impacts, and providing water deliveries to irrigators and municipalities and industrial users.

In accordance with the specific directive of CVPIA § 3406(b)(23), the Tribe concurred in the TRFEFR and associated Trinity River Mainstem Fishery Restoration Record of Decision on December 18, 2000. The Tribe considers that action to be a treaty with the United States.

As mentioned above, courts have rejected repeated lawsuits by San Luis Unit contractors challenging the priorities for Trinity River Division water use. See Patterson, 204 F.3d at 1214 (holding that the Bureau has "a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators"). The Subcommittee should not approve these settlements in the absence of provisions that will finally and certainly end challenges to the Trinity River Division priorities.

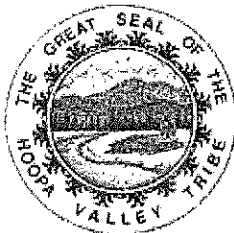
Construction and operation of the Trinity River Division has allowed a transfer of wealth and use opportunities from the Tribe to interests in the Central Valley, particularly those on the west side of the San Joaquin River Valley whose lands are supplied with water made available by the Trinity River Division. Those actions have been made at the expense of environmental justice standards and the mandates to first meet Trinity Basin water demand for fish and wildlife and economic development as a precondition for export of any Trinity River Division water to the Central Valley. The government's negligence and malfeasance have negatively impacted the ability of the Tribe to meaningfully use and enjoy the fundamental purposes for which the Hoopa Valley Indian Reservation was set aside by the United States. Moreover these actions have significantly diminished the ability of the Tribe to maintain its customs, traditions and culture or develop its economy.

The Department of the Interior cannot set aside Hoopa tribal trust obligations when convenient for settling competing Administration program interests. The thousands of pages of administrative records that describe history of the Trinity River Division clearly demonstrate that there are limits on the transfer of Trinity River wealth to San Luis Unit interests and others in the Central Valley. Just as clear, the restoration of the fishery resources of the Trinity River was judicially recognized to be "unlawfully long overdue." Westlands Water Dist. V. U.S. Dept of Interior, 376 U.S. 853, 878 (9th Cir. 2004). It is unacceptable for the Department of the Interior to resolve its obligations to San Luis Unit contractors without terminating the ability of the San Luis Unit contractors to wage war against the Department's trust beneficiary, the Hoopa Valley Tribe.

Attachment 2 to this testimony is a proposed Title II designed to fulfill the Trinity River Division's and remediate the historic and ongoing breaches of trust to the Tribe. At least these, and possibly other provisions must be included in any bill that moves forward. I appreciate the opportunity to submit my written testimony on behalf of the Hoopa Valley Tribe.

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Relationship between the Central Valley Project's Trinity River Division and San Luis Unit

Prepared by the Hoopa Valley Tribe

October 2015

The Hoopa Valley Tribe has assembled information from the legislative record of the statutes that authorized the Trinity River Division (TRD), Pub. L. 84-386, August 12, 1955 (TRD Act) and the San Luis Unit (SLU), Pub. L. 86-488, June 3, 1960 (SLU Act) as components of the Central Valley Project (CVP). In addition to information in the legislative record, two maps prepared by Trinity County depict the relationship of TRD water to the SLU.

Introduction

The TRD is the only source of CVP water imported to the Central Valley. The water and energy developed by the TRD are integral to the development, construction, and operation of the SLU. Congress conditioned the use of TRD water and energy for the benefit of the SLU and other CVP purposes by establishing first priorities to TRD water for Trinity River fish and wildlife resources and California's North Coast's economy. The Bureau of Reclamation disobeyed or ignored or rejected those priorities for decades.

Construction, operation and maintenance of the TRD and the SLU caused widespread catastrophic environmental impacts in both the Trinity basin and in the Central Valley. Damming the Trinity River and over diverting water to the Central Valley devastated Trinity basin fish and wildlife and caused economic hardship in North Coast Communities. At the same time, the Bureau of Reclamation permitted SLU contractors to irrigate Central Valley lands whose soils they both knew were not practicably irrigable without construction of costly drain water disposal facilities.¹ The federal government did not develop the required drainage facilities and irrigation on the SLU caused ecological devastation in the Central Valley as well.

¹ For example, the high levels of chlorides anticipated from the SLU caused Congress in section 4 of the SLU Act to establish a criterion for chloride contaminants that limited diversions to the SLU in an amount not to "exceed the mean daily import to the Sacramento Valley from the Trinity project" (emphasis added). Thus the Bureau of Reclamation conveyed high-quality Trinity River water hundreds of miles to dilute degraded water supplies for the SLU. The chloride criterion applied in the event the Secretary developed the SLU solely as a federal project.

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Firebaugh Settlement

The recently announced settlement between the United States and the San Luis Unit's Westlands Water District (Westlands) would conclude litigation brought to enforce a federal obligation to provide irrigation drainage. Firebaugh Canal Water District v. United States, E.D. Calif. Case 1:88-cv-00634-LJO-DLB.

The Hoopa Valley Tribe opposes the settlement because the settlement terms leave SLU contractors free to continue their decades-long assault on the rights of the Tribe and others in the North Coast community to TRD water established in the TRD Act and SLU Act, along with related legislation including the Trinity River Restoration Act, Pub. L. 98-541, and the Central Valley Project Improvement Act, Pub. L. 102-575 §3406(b)(23). The excerpts and accompanying notes explain the connection of the SLU to the TRD.

Excerpts and notes on TRD Act and SLU Act legislative history.

Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, Hearing on H.R. 4663 to authorize the Trinity River division, Central Valley Project, 84th Cong., 1st Sess. (April 13, 1955)

Page 3

The Interior Department's Report (April 12, 1955) on H.R. 105 to authorize construction of both the TRD and the SLU advises the Committee on Interior and Insular Affairs that the Department's proposed report on the TRD is undergoing review with state and federal agencies. However, the Department reports that the corresponding report on the SLU "will necessarily be somewhat further delayed. A planning report on that development is now in preparation." SLU not authorized until 1960 (Pub. L. 86-488 (74 Stat. 159)). The Report includes information describing the relationship between TRD and SLU, stating of TRD water that "the importance of imported water to the San Joaquin River Basin, where large areas are experiencing an alarming drop in the ground water table as a result of pumping, cannot be overestimated."

Page 4

[Assistant Secretary of the Interior letter report on H.R. 4663] "Of these 1,190,000 acre-feet [from the TRD] . . . 525,000 acre-feet would be available for use on other lands in the Central Valley such as those of the potential San Luis Unit."

"The fishery resources of Trinity River are an asset to the Trinity River Basin as well as the whole northern coastal area. Accordingly, the Trinity River development has been and should be planned with a view to maintaining and improving fishery conditions."

Page 5

[Assistant Secretary letter] "The flow schedule proposed by the Fish and Wildlife Service is predicated on the seasonal needs of the fishery resources. Since flows should vary in accordance with estimated requirements, the Service-proposed flow schedule is preferable to the flat minimum flow requirement for the months of July

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through November below Lewiston diversion dam prescribed in H.R. 105, and it is desirable that the minimum flows adopted by the Department for other periods of the year be incorporated in the legislation. Room should also be left in any legislation that is enacted for modification in the light of experience.”

“If the San Luis Unit is authorized, the energy available for commercial sale from the Central Valley Project power system, even including a Government-built Trinity power development, will be decreased below its output without Trinity and San Luis. This decrease will result from the use of energy for San Luis pumping loads.”

Page 6

[Assistant Secretary letter] “Our studies to date indicate that, as an addition to the Central Valley Project, the San Luis unit is feasible both from an engineering and financial viewpoint. Its water supply would be obtained in part from surplus winter flows of the Sacramento and San Joaquin Rivers that now waste into the ocean and in part from water made available as a result of the Trinity River division” (emphasis added).

Page 10

[Clyde Spencer, Regional Director BOR] *With regard to TRD water being available for Trinity basin fish and wildlife:* “The basic operating criterion has been one of meeting these minimum downstream requirements as a first order of priority; all other requirements have been made secondary.”

Page 16

[Spencer] Preliminary studies are completed on a possible San Luis unit of the Central Valley project. This unit would provide irrigation water for an area of about 500,000 acres on the west side of the San Joaquin Valley. Over 700 million kilowatt-hours of pumping energy are required from this unit. In studying the Trinity River development, we have been very much aware of the need for meeting this large pumping load. If the San Luis unit is eventually authorized as a part of the Central Valley Project, it too would be integrated in operation with other features of the project, and ample power would be available for an all-Federal project including Trinity . . .”

Page 19 *A substantial portion of the legislative history of the TRD involved debate about the TRD as a public power development or a private development with an entity such as PG&E. In this next portion of the hearing Cong. Engle speaks against assertions that private development would be better. Cong. Engle stressed that power was the “thing” as far as SLU was concerned, not water. (That is not true, as Cong. Engle himself states earlier and elsewhere in the record.) In fact the SLU required both water and power benefits from the TRD. The SLU’s use of each came at the direct expense of the Trinity River basin. The Trinity River’s kinetic energy created a river of riffles, pools and all else associated with the dynamic equilibrium of a healthy river system. The TRD converted that energy from river formation into electricity for irrigation pumping and municipal and industrial purposes. The TRD transferred both*

Trinity water and energy to the SLU, on the condition that the TRD first satisfy all needs for water in the Trinity basin.

Section 1 of the TRD Act eliminated what threatened to become a stalemate over the public/private power development issue with the inclusion of a proviso directing the Secretary to negotiate the matter:

“the Secretary is authorized and directed to continue to a conclusion the engineering studies and negotiations with any non-Federal agency with respect to proposals to purchase falling water and, not later than eighteen months from the date of enactment of this Act, report the results of such negotiations, including the terms of a proposed agreement, if any, that may be reached, together with his recommendations thereon, which agreement, if any, shall not become effective until approved by Congress.”

[Clair Engle] “I put the bill in originally as a joint bill for Trinity and San Luis. [California Senators] Senator Kuchel and Senator Knowland have put in identical bills.”

Page 20

[Clair Engle] “Its contribution to the San Luis is really the power that comes out of the Trinity project and feeds the pumping plants necessary to make the San Luis Project work.”

Page 29

[Spencer] “We would not want to forget that in the [incomplete report on the SLU] we have estimated it would require over 700 million kilowatt-hours annually for pumping.”

Page 30

[A.N. Murray, BOR Regional Planning Engineer] “The two projects at Shasta and Trinity have been planned to operate in a completely coordinated manner. In critical periods, when we would be short of water, we naturally would draw on Trinity to meet the irrigation and other water requirements. We would draw on Trinity first in preference to drawing on Shasta because we can get three times as much power out of the same quantity of [Trinity] water.

Page 46

[Murray] “The Trinity River unit is expected to increase the salable energy of the Central Valley project by 1,067 million kilowatt-hours annually and we expect the dependable power as defined in our contract, to rise initially to about 740,000 kilowatts. Then as our irrigation pumping loads increase, the dependable power would settle or stabilize at 600,000 kilowatts. That estimated amount of power again reflects the terms of contracts we now have with the company [PG&E] under which power is firmed up by the company.”

Page 93

[Congressman Sisk D-CA] “This particular project, the Trinity and the San Luis project, have already been considered as definite parts of and an integral part of and feature of the Central Valley project from its very inception.”

Page 115

[PG&E testimony] “Several of the Trinity bills now before your committee also provide for the construction of the San Luis unit of the Central Valley project to furnish water to the west side of the San Joaquin Valley. The additional net revenue to the Government under the company’s proposal for Trinity could be used to reduce the cost of project water or to assist the financing of the San Luis Unit or other needed water projects in California.

“The Bureau’s draft report on the San Luis unit shows that the Central Valley project dependable commercial power capacity would be reduced about 290,000 kilowatts if the power required for San Luis pumping is supplied directly by project power plants. This would reduce project power revenues about \$3,750,000 annually.”

Page 178

[Letter from California State Assemblymen to Cong. Engle] “We advocate immediate construction of both Trinity and San Luis projects. Federal construction of Trinity project is necessary to provide low-cost power for the pumping plants which will lift the water from Sacramento-San-Joaquin delta to the San Luis storage reservoir in order that it may be distributed to farmers in the San Joaquin Valley at a price they can afford to pay.”

House Report No. 602, 84th Cong., 1st Sess. on H.R. 4664 (May 19, 1955)

Page 3

“Along the west side of the San Joaquin Valley, where a portion of the Trinity water is proposed to be used, and the water situation is rapidly reaching a critical stage. Large areas are experiencing an alarming drop in the ground-water table and will go out of production in a very few years unless additional water supplies are imported to the area.”

Page 4

“Under the plan of development and operation an average of 704,000 acre-feet of Trinity River water would be diverted annually to the Sacramento River Basin. This amount, when coordinated with the operation of the Central Valley Project system, would provide about 1,190,000 acre-feet of water for additional use in the Central Valley. Of this 1,190,000 acre-feet, about 665,000 acre-feet would be used annually, under the plan, to meet the ultimate needs of the Sacramento canals service area, comprising about 200,000 acres, and about 525,000 acre-feet annually would be available for use on lands of the west side of the San Joaquin Valley. The total installed hydroelectric power capacity proposed in the plan would be 233,000 kilowatts, which would increase the Central Valley project energy by over 1 billion kilowatt-hours annually.

"The fishery resources of the Trinity River are an asset to the Trinity River Basin as well as to the whole north coastal area. Accordingly, the Trinity River development has been planned with a view to maintaining and improving fishery conditions. The legislation requires that the project be operated so as to insure the preservation and propagation of fish and wildlife and sets out minimum flows to be maintained below the Trinity diversion point and below the Clear Creek diversion point.

"With respect to the trans-mountain diversion of water from the Trinity River Basin to the Central Valley, the committee notes that such diversion is approved by the State of California. The committee notes also that both the State and the Bureau of Reclamation conclude that there is available for importation from the Trinity River, water that is surplus to the present and future water requirements of the Trinity and Klamath River Basins, and that surplus water, in the amount proposed in the Trinity division plan, can be diverted from the Trinity River to the Central Valley without detrimental effect to fishery resources. The committee believes it unnecessary to await the final results of studies presently underway to determine precisely the future water requirements in the Klamath River Basin before going ahead with this relatively small diversion compared to the average amount wasting to the Pacific Ocean from the basin each year."

Congressional Record—House of Representatives (June 21, 1955)

Page 8878

"Mr. Johnson of California. As I understand it, the Trinity River is being diverted so that we can use the water down in the dry, arid region of the interior valley—that is correct, is it not?

"Mr. Engle. The Trinity River is being diverted to make up the deficit which now exists in the Central Valley Project due to the over commitment of those supplies in the San Joaquin Valley and elsewhere.

"Mr. Johnson of California. That Trinity River water, which would have gone to the Pacific Ocean, is not required in the area through which it flows and finally goes into the ocean.

"Mr. Engle. No, about 13 million acre-feet of water goes out into the Pacific from Klamath and Trinity, which is one of its tributaries. The gentlemen from California [Mr. Scudder] represents that area and will have something, I think, to say about that. But with reference to this project, it does not hurt him. It diverts about 17 percent of the total flow of the Trinity River, and these are flood waters.

"Mr. Johnson of California. I realize how the water tables are falling in certain parts of the Central Valley, especially in my own county, San Joaquin County. I think the gentleman is doing a great service to our people by helping us to find a way to get water so that we can raise the crops he just described a moment ago as well as many other crops which are much more fabulous."

San Luis Unit Authorization, Pub. L. 86-488 (74 Stat. 159) June 3, 1960.

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S. 178, 84th Cong. 1st., Sess. would have authorized both TRD and San Luis Unit, but final analysis of that project was delayed and the SLU was not authorized as part of the TRD, though it was authorized five years later.

Section 1 of the SLU Act provides authority to the Secretary to construct the SLU. Section 4 of the SLU Act specifically linked TRD diversions to the operation of the SLU.

Whenever the chlorides in the water at the head of the Delta-Mendota Canal exceed one hundred and fifty parts per million during the months of July, August, or September, the mean daily diversion from the Sacramento-San Joaquin Delta to San Luis unit via Tracy pumping plant and Delta-Mendota Canal as measured at the San Luis pumping plant shall not exceed the mean daily import to the Sacramento Valley from the Trinity project.

Bureau of Reclamation's November 1956 Feasibility Report on the San Luis Unit.

Some of the information in the 1956 SLU report below dates from prior to the TRD authorization and so refers to the "proposed" TRD.

Page 1

Letter from Secretary of the Interior to the President, August 1, 1956: "The Unit will provide a full water supply to 440,000 acres of land along the west side of the San Joaquin valley. Most of this area is presently irrigated from ground water, but due to the rapidly lowering water levels, it is estimated that less than 150,000 acres can be sustained in permanent irrigated agriculture under present conditions.

Page 3

"Power from the Trinity River Division is contemplated as the major source for the San Luis Unit pumping requirements, and hence, in addition, final arrangements for construction of Trinity power facilities now under negotiation with non-Federal interests could well affect the nature of any contract to supply power to the State for San Luis Unit pumping purposes."

Page 7-8

"A fourth basic element considered was the large block of electric energy that would be required each year if the water surpluses of the sea-level Delta are to be lifted to the San Luis Unit service area at elevations of from 200 feet to 485 feet above sea level. Facilities of the Central Valley Project represent an economic source from which to obtain the needed huge block of energy, either directly or by arrangements in connection with the sale of falling water for power generation by a non-Federal agency in connection with Trinity River Division of the Central Valley Project. As stated in your January 19, 1955 report, which was adopted by Secretary McKay as his proposed report on the Trinity River Division, assurance of power for San Luis pumping, on advantageous terms would be basic in such arrangements. Since there are no existing arrangements to sell falling water in connection with the Trinity River development, estimates in this report are based on power supplies from Federally-

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constructed power plants.”

Report of the Fish and Wildlife Service, pages 24-25.

“In regard to regulations, it must be emphasized that both without- and with-the-project conditions assume full operation of all reservoirs recently completed and under construction as well as Trinity Reservoir (2.5 million acre-feet capacity) which now is only proposed but is essential for operation of the San Luis Unit (emphasis added).”

Selenium soils
and
Trinity River Division water,
US CVP POU,
California
(Trinity Co. Exhibit 17)

Kesterson NWR

★ Coalings

+ Irwin

Northern City

Los Rios

★ Merced

Trinity River water

Trinity River water

Parker's WD

San Luis WD

Westlands WD

county roads

U.S. Interstate 5

county lines

0-18

19-36

37-54

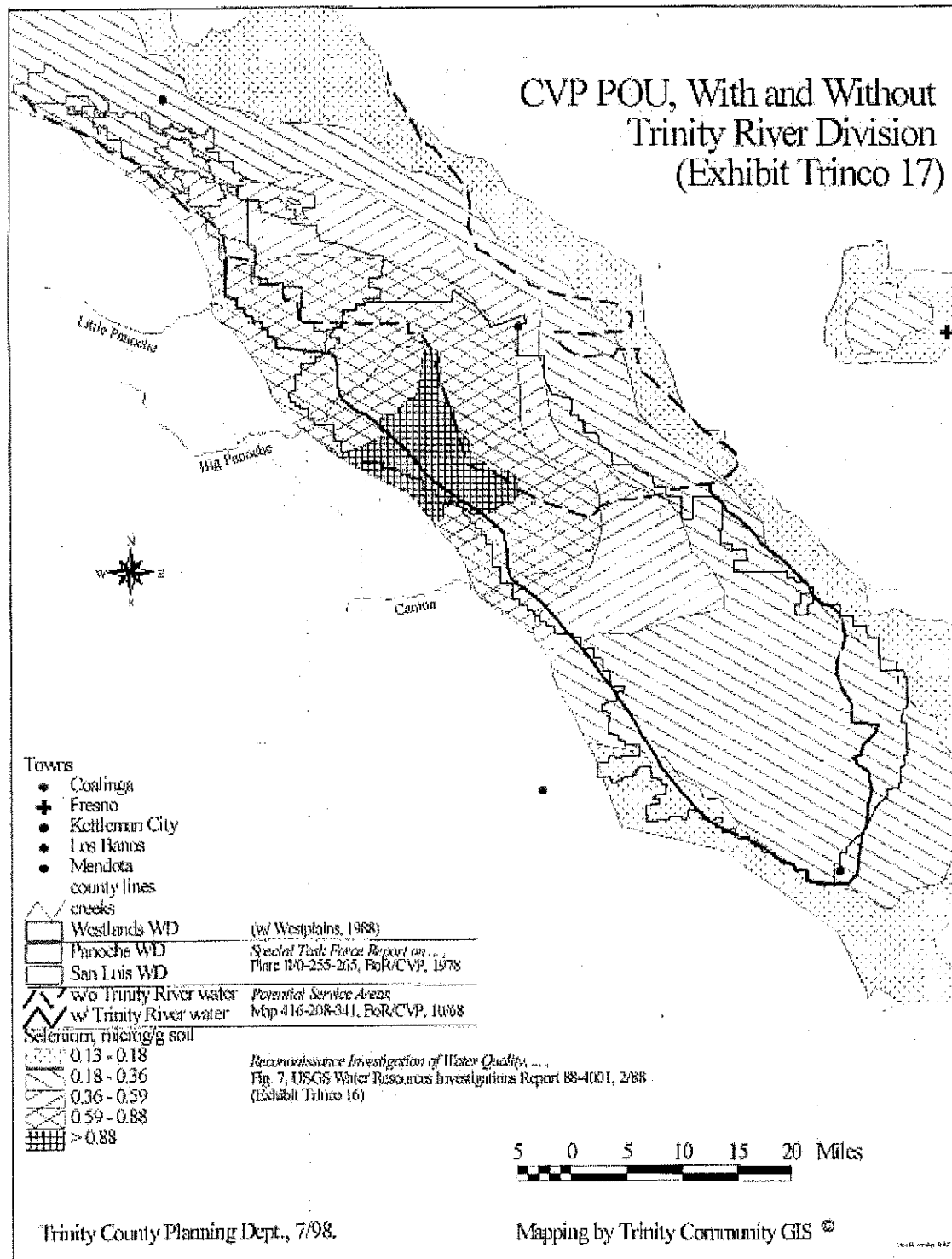
55-72

73-90

91-108

109-126

Scale: 0 5 10 15 20 Miles



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H.R. 4366 and H.R. 5217, 114th Cong. 2d Sess.

Title II Fair Treatment of the Hoopa Valley Tribe

In the San Luis Unit Drainage Resolution Act

Section 1. The Congress finds and declares that--

(1) The Trinity River Act of August 12, 1955 (Pub. L. 84-386) (Trinity Act) established the Trinity River Division (TRD) of the Central Valley Project (CVP);

(2) The San Luis Unit Act of June 3, 1960 (Public Law 86-488) (San Luis Act) established the San Luis Unit of the CVP;

(3) The TRD supplies water and power for the operation of the San Luis Unit, among other uses;

(4) Transfer of the wealth of Trinity River resources by operation of the TRD, including the Trinity River fish hatchery, has damaged the Trinity River fishery for which the United States has Federal trust responsibilities by degrading the river channel, native vegetation, habitat, water quality, and traditional fishing sites on the Hoopa Valley Indian Reservation (HVIR) recognized by the United States in 1864, upon which the Hoopa Valley Tribe (Tribe) has depended since time immemorial for its subsistence, cultural and economic needs;

(5) The Trinity Act establishes priorities for in-basin uses of TRD water for preservation and propagation of fish and wildlife over needs served by out-of-basin diversions; and

(6) The Secretary of the Interior and the Tribe concurred in permanent instream fishery flow requirements and Trinity River Division operating criteria and procedures for the restoration and maintenance of the Trinity River fishery in the Trinity River Mainstem Fishery Restoration Record of Decision (December 2000) pursuant to Public Law 102-575 §3406(b) (23) that established the Trinity River Restoration Program (TRRP).

Section 2.

Notwithstanding any other provision of law, upon the date of enactment of this Act, in order to mitigate the adverse impacts of diversion of Trinity River water, fulfill the priorities for use of TRD water, and meet Federal trust responsibilities for the property rights and

sovereignty of the Hoopa Valley Tribe, the Secretary shall without delay:

(1) beginning in fiscal year 2016 and through fiscal year 2026, assess and collect annually from CVP water and power contractors the sum of \$2,500,000 (October 2016 price levels) and remit, without further appropriation, the amount collected annually to the Tribe; *Provided that*, annually thereafter the sum shall be \$1,000,000; *Provided further*, that these assessments shall be payable 70 percent by CVP Preference Power Customers and 30 percent by CVP Water Contractors. The CVP Water Contractor share of this assessment shall be collected by the Secretary through established Bureau of Reclamation (Reclamation) Operation and Maintenance rate setting practices. The CVP Power Contractor share of this assessment shall be assessed by Reclamation to the Western Area Power Administration, Sierra Nevada Region (Western), and collected by Western through established power rate setting practices. The Tribe shall have complete discretion to invest and manage the funds remitted to the Tribe by this section: *Provided*, That the United States shall not bear any obligation or liability regarding the investment, management or use of such funds; *Provided further*, That such funds shall be used to serve common tribal needs, educational requirements, and such other purposes as the circumstances of the Tribe may determine; *And provided further*, That no per capita distribution may be made from such funds.

(2) Direct the Commissioner of Reclamation to establish a Trinity River Area Office that reports directly to the Mid-Pacific Regional Office of the Bureau of Reclamation.

(3) Develop a plan with the concurrence of the Tribe to renovate and operate the Trinity River Hatchery (Hatchery) to fulfill its mitigation function for replacing lost fish production above the Lewiston Dam in a manner complementary with the Trinity River Restoration Program (TRRP) natural and Endangered Species Act (ESA) stock management downstream of the TRD. The plan shall include co-managed implementation of an Hatchery and Genetics Management Plan (HGMP) approved by the National Oceanic and Atmospheric Administration for the Hatchery that incorporates a segregation weir. The plan shall further integrate natural fish production consistent with the HGMP to hasten the delisting of Coho salmon as an ESA-listed species and to restore Coho populations to a level approximating that which existed immediately before the start of construction of the TRD.

(4) Upon concurrence of the Tribe in the plan referred to in paragraph 3 of this section, transfer operation of the hatchery to the Tribe. Costs associated with paragraph (3) and this paragraph, including those costs to fund the development and implementation of a Fishery Monitoring and Evaluation Plan (FMEP) to assess the long term effectiveness of

implementation of the hatchery HGMP, shall be reimbursable as operation and maintenance expenses of the Central Valley Project.

(5) With the concurrence of the Tribe establish and incorporate into the TRRP programs for:

- (i) Land acquisition associated with TRRP restoration sites that are necessary or useful for efficient fishery restoration, preservation and propagation;
- (ii) A Pacific Lamprey conservation and management program;
- (iii) A restoration program for natural fish populations in the South Fork Trinity River.

(6) Develop and implement a memorandum of agreement with the Tribe for technical data acquisition, analyses, design and construction of alternative infrastructure at Trinity Dam and Lewiston Dam for conservation of cold water resources developed by the Trinity River Division.

(7) Design and construct fishing sites on the HVIR to mitigate for the loss of traditional sites caused by the development and operation of the Trinity River Division.

(8) Reinitiate ESA consultation on TRD operations for the purpose of conforming management of Trinity River Division cold water resources to the priorities established for fish and wildlife in section 2 of Public law 84-386. The Secretary is directed, in consultation with the Tribe, to develop a ESA recovery plan that proportionally balances the conservation burden for ESA take limitations between activities conducted on the HVIR with off-Reservation activities where most of the impacts have occurred that have caused ESA listing of Klamath River Basin origin anadromous fish stocks.

(9) pursuant to Public Law 102-575 §3404(c)(2) and 3406(b)(23), amend and administer all existing, new, and renewed Central Valley Project contracts and amend operation and maintenance rate books and other administrative rules and guidelines for the Central Valley Project to fund the TRRP at \$16.4 million annually (October 2007 price levels) through construction and \$11 million annually (October 2007 price levels) thereafter for so long as TRD water is diverted to the Central Valley as reimbursable operation and maintenance costs.

(10) Act to ensure that by 2035, the goals of the TRRP, Public Law 84-386 as amended by Public Law 104-143, and this Act are fulfilled.

(11) If requested by the Tribe or Humboldt County, arrange to accumulate and store in Trinity Reservoir not less than 150,000 acre-feet of Trinity River Division water from

volumes required to be released annually from Trinity Reservoir and made available to Humboldt County and downstream water users pursuant to the second proviso in section 2 of Public Law 84-386.

(12) With the concurrence of the Tribe plan, design and construct a plant on the HVIR for the Tribe's use of water and economic development.

(13) With the concurrence of the Tribe, design and construct a fish processing facility on the HVIR for use as the Tribe prescribes.

(14) With the concurrence of the Tribe, plan, design and construct an irrigation system on the HVIR.

(15) With the concurrence of the Tribe, arrange to release Trinity River Division water pursuant to the first proviso in section 2 of Public Law 84-386 in addition to that identified in the 2000 Trinity River Restoration Record of Decision (ROD) that may be necessary to preserve and propagate anadromous fish that occur in the Klamath River below its confluence with the Trinity River.

(16) Require that minimum releases from the location of Iron Gate Dam follow Ecological Base Flow recommendations of the Hardy II flow study (2006). Operation of Reclamation facilities upstream of Iron Gate Dam will ensure daily average releases no lower than the following: October, 1395cfs; November, 1500cfs; December, 1260cfs; January, 1130cfs; February 1415cfs; March, 1275cfs; April, 1325cfs; May, 1175cfs; June, 1025cfs; July, 805cfs; August, 880cfs; September, 970cfs. In addition, Iron Gate releases shall be sufficient to guarantee unimpeded passage of adult anadromous fish through the Klamath River and into the Trinity River in the months of August through October.

(17) Ensure that any agreement related to rights in the Klamath River held by the United States in trust for the Tribe has the concurrence of the Tribe.

(18) develop Klamath-Trinity basin anadromous fish harvest allocation procedures based on individual stocks and runs with the concurrence of the Tribe that avoid shifting harvest efforts from Klamath River origin stocks to Trinity River origin stocks by any tribe.

(19) With the concurrence of the Tribe, develop an Integrated Monitoring and Research Plan for the Klamath River. The plan shall bring together Tribal, agency, and academic scientists and managers from many disciplines as co-managers to address the following topics: *Population Status and Trends; Fish Health; Life History Assessments; Freshwater Habitat Assessments; Ocean Population Dynamics; Ocean Harvest; In-river Harvest; Hatchery Supplementation; Integration; Coordination and Public Outreach.*

(20) With the concurrence of the Tribe, develop and implement permitting standards and compliance measures to improve water quality for the Straits Drain outfall of the Klamath Irrigation Project.

(21) With the concurrence of the Tribe, establish specific terms, criteria and required actions under the Bureau of Reclamation's Klamath Project Office's Drought Plan.

(22) The Secretary is prohibited from transferring the Iron Gate hatchery mitigation facilities on the mainstem of the Klamath River near Hornbook, CA to a non-federal entity. The Secretary is directed in consultation with the Tribe to develop an integrated hatchery and ESA/natural stock management program for Iron Gate hatchery that fulfills mitigation responsibilities for which the facilities were constructed, balances its impacts on ESA and natural stocks, and meets federal trust responsibilities to the Tribe.

(23) Conform Central Valley Project and Klamath Project operations to the requirements of this Act.

Section 3.

The Secretary is authorized to enter into contracts, memoranda of understanding, financial assistance agreements, and other appropriate agreements with the Tribe related to implementation of this Act. Federally funded activities associated with the management of trust assets of the Hoopa Valley Tribe are deemed to be mandatory obligations and programs of the United States for purposes of contracting with the Tribe under the Tribal Self-Governance Act, Indian Self-Determination Act (Pub. L. 93-638, as amended), or other contracting mechanism agreed upon with the Tribe.

Section 4.

Nothing in this Act shall be construed as authorizing the United States to tax the Hoopa Valley Tribe or its members on the basis of a benefit resulting from this Act.

Section 5. Authorization of Appropriations

(a) There are authorized to be appropriated and to remain available until expended, in addition to the payments identified in section 2(1)—

(1) Not less than \$20,000,000 (October 2016 price levels) to implement section 2 (5)

(i)

(2) Not less than \$10,000,000 (October 2016 price levels) to implement section 2(5)(ii)

(3) Not less than \$30,000,000 (October 2016 price levels) to implement section 2(5)(iii)

24 May 2014

Statement of Ryan Jackson, Chairman, Hoopa Valley Tribe of Northern California

- (4) Not less than \$10,000,000 (October 2016 price levels) to implement section 2(7)
 - (5) The sums and price levels identified in section 2(9)
 - (6) Not less than \$5,000,000 (October 2016 price levels) to implement section 2(12)
 - (7) Not less than \$5,000,000 (October 2016 price levels) to implement section 2(13)
 - (8) Not less than \$17,000,000 (October 2016 price levels) to implement section 2(14)
- (b) Notwithstanding any other provision of this act, the relief of capital repayment obligations provided for in Title 1 shall not take effect until the funds authorized in this section have been appropriated.

Section 6.

Notwithstanding any other provision of this Act, the Secretary shall not exercise her authority to execute the Westlands Agreement or Northerly Districts Agreement until they have been amended consistent with the provisions of this Title.

Section 7. Effective Date

Sections 3, 5, 6, 7 and 8 in Title I of this Act shall take effect only when—

(1) The plaintiffs have dismissed with prejudice the proceedings in *San Luis & Delta-Mendota Water Auth. v. United States*, E.D. Cal. No. CV-F-97-5531; *Westlands Water Dist. v. United States*, E.D. Cal. No. CV-F-00-7124; *Westlands Water Dist. v. United States*, 376 F.3d 853 (9th Cir. 2004); *San Luis & Delta-Mendota Water Auth. v. Jewell*, E.D. Cal. No. CV-F-13-1232; *San Luis & Delta-Mendota Water Auth. v. Jewell*, E.D. Cal. No. CV-F-15-1290; *San Luis & Delta-Mendota Water Auth. v. Jewell*, 9th Cir. No. 14-17493.

(2) Terms have been included in the converted contract provided for in section 6(a) (1) of this Act, or any contracts pursuant to Public Law 102-575 §3404(c) or any other law, including but not limited to the Reclamation Project Act of 1939, 53 Stat. 1187 by which the non-federal parties to the Northerly Districts Agreement and the Westlands Agreement acknowledge and affirm:

(A) their obligation to pay their allocated share of TRRP funding of \$16.4 million annually (October 2007 price levels) through construction and \$11 million annually (October 2007 price levels) thereafter for so long as the TRD diverts water as reimbursable operation and

maintenance costs of service pursuant to Public Law 102-575

§3406(b)(23) (B);

(B) that the two provisos in section 2 of Public Law 84-386 (August 12, 1955) represent separate and independent limitations on the TRD's integration with, and diversion of water to, the Central Valley Project;

(C) that the water under both limitations is available for any beneficial use;

(D) that the quantities of water subject to the limitations in subparagraph (B) include the amounts identified in the Trinity River Mainstem Fishery Restoration Record of Decision (December 2000); any additional quantity required for the preservation and propagation of fish and wildlife in the Trinity River and the Klamath River below its confluence with the Trinity River, and not less than 50,000 acre-feet annually to be released and made available from Trinity Reservoir for Humboldt County and downstream users; and

(E) that the Secretary has authority to accumulate up to 150,000 acre-feet of water in Trinity Reservoir storage of the annual entitlement of 50,000 acre-feet identified in the second proviso of section 2 in Public Law 84-386.

83524.1:730238;01940

**U.S. House of Representatives
Natural Resources Committee
Subcommittee on Water, Power and Oceans
114th Cong., 2d Session
Legislative Hearing on Water Settlements
May 24, 2016**

**Proposed Questions by the Hoopa Valley Tribe
on the Relationship of H.R. 4366 and 5217, San Luis Unit Drainage Resolution Act,
to Unfulfilled Federal Tribal Trust Responsibilities and other Legal Obligations for Trinity River Fish,
Wildlife and Water Supplies.**

If some form of this drainage legislation is enacted, what is the dollar amount of damages the Administration estimates it will avoid liability for in the pending drainage litigation?

What is the basis for that estimate?

How much will the San Luis Unit contractors benefit directly from provisions of the legislation that forgive capital repayment obligations?

Has the Administration identified any other financial benefits to the contractors from the settlement?

Does the repayment obligation forgiveness include the capital obligation for the Trinity River Division facilities including the Trinity River hatchery?

What is the effect of the conversion to section 9(d) contracts from 9(e) from: (1) the point of view of the contractors; (2) from the point of view of the Bureau of Reclamation; (3) with respect to access to Trinity River Division water; and (4) from the federal taxpayer?

How much Trinity River Division water will be allocated to the water delivery commitment under the 9(d) contract provided for in the settlement?

The Congressional Budget Office will review this legislation to assess its impact under Pay As You Go requirements. CBO has the authority to provide preliminary scoring estimates, Has CBO done so? Does the CBO score comport with the Administration's representation of avoided federal liability?

As Trustee for the Hoopa Valley Tribe, how can the Administration agree to a settlement based on a CVP water supply to which the trust beneficiary tribe has first priority under Reclamation law without ensuring that any pending dispute the San Luis Unit contractors have about that priority is fully and finally resolved in the beneficiary's favor?

Will the Administration support using any portion of the avoided liability for drainage over and above the capital repayment forgiveness in the legislation as a Pay For to fund the Hoopa Valley Tribe's proposed Title II of this legislation attached to their testimony? If not, why not?

Section 3404(c)(2) of the Central Valley Project Improvement Act requires the Secretary to incorporate in any contract for CVP water the provisions of the CVPIA and other law.

To the Administration's and the Contractors' witnesses: Will you agree to fulfill that requirement in the agreements that would be authorized by the settlement, including: (1) the CVPIA requirement for

contractors to pay for the costs of the Trinity River Restoration program for as long as water is diverted by the Trinity River Division; (2) acceptance of the separate priorities provided for in section 2 of the 1955 Act authorizing the Trinity Division and senior to diversions to the Central Valley? If not, why not?

If the witnesses refuse to address the prior question because it is in litigation then ask: Why should this drainage settlement proceed when fundamental issues regarding entitlement to water for delivery to the San Luis Unit remain unresolved? If San Luis Unit contractors are not entitled to the water being sought in this settlement, wouldn't a consequent reduction in water deliveries to the San Luis Unit potentially resolve a portion of the drainage problem by reductions in CVP water deliveries to the San Luis Unit?

Does the settlement create or affect any new or existing authority to market CVP water that would be delivered to contractors under this settlement? In any event, would you agree to remit all income from water sales in excess of the costs of delivery to you to fund the Title II activities proposed by the Hoopa Valley Tribe? *Approximately \$100 million.* If not, why should the Administration confer a water marketing benefit on San Luis Unit contractors that is unrelated to the issue of drainage?

To the Administration and Contractors' witnesses: In addition to the financial benefits of this settlement, do you expect certainty and finality with respect to the nature and extent of your water supply from the Central Valley Project as a result of this settlement, at least to the extent now enjoyed by other CVP contractors?

If yes: Would Congress be remiss in settling this matter before knowing what portion of the Trinity Division's water supply is available to be integrated with CVP supplies to fulfill the expectations of the settlement parties?

To the Administration witness:

On December 23, 2014, the Solicitor issued Opinion M-37030 regarding Trinity River Division Authorization's 50,000 Acre-Foot Proviso and the 1959 Contract between the Bureau of Reclamation and Humboldt County. In the 18 months since then, have the Department's water managers accounted for that opinion's conclusion in CVP operations models and estimates of water supply? *If yes,* What has the Department done. *If not,* why not?

This water supply is important to the Hoopa Valley Tribe and the North Coast communities of the Second Congressional District in California. Its guarantee was a bargained for benefit for construction of the Trinity River Division. That right is being challenged by the Contractors. Why should Congress not insist on resolution of that dispute as part of this settlement?

From: Jason Peltier

Sent: Thursday, July 28, 2016 4:43 PM

To: Ara Azhderian; Johnny Amaral; Dennis Cardoza; Ed Manning; Carolyn Jensen; David Bernhardt

Subject: PPIC Survey on public views of the environment. contains link to full report

<https://mavensnotebook.com/2016/07/28/news-worth-noting-new-ppic-survey-on-californians-and-the-environment-dropcountr-is-asking-for-your-feedback-notice-of-proposed-emergency-regulatory-action-groundwater-sustainability-plans-and-al/>

From: Johnny Amaral

Sent: Monday, August 1, 2016 9:50 AM

To: David Bernhardt; Denny Rehberg; Ryan A. ' 'Smith; Dennis Cardoza; Catherine Karen

Subject: No call today

Sorry for the short notice

Best,

Johnny Amaral

From: Bernhardt, David L.
Sent: Monday, August 1, 2016 9:52 AM
To: 'Johnny Amaral'
Subject: RE: No call today

OK.

-----Original Message-----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Monday, August 01, 2016 10:50 AM
To: Bernhardt, David L.; Denny Rehberg; Smith, Ryan A.; Dennis Cardoza; Catherine Karen
Subject: No call today

Sorry for the short notice

Best,

Johnny Amaral

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From: Bernhardt, David L.
Sent: Thursday, August 4, 2016 3:05 PM
To: Johnny Amaral
Subject: Flight Snafu

Due to a flight snafu, I will not make either of tomorrow's calls. Ryan will be on.

David

David Bernhardt

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From: Johnny Amaral
Sent: Thursday, August 4, 2016 4:37 PM
To: Smith, Ryan A.
Subject: Re: RedCanyon?

Yes we are. Bernhardt said that he's unavailable but that you know the code to activate the 10 AM call.

Best,

Johnny Amaral

On Aug 4, 2016, at 4:34 PM, Smith, Ryan A. <RSmith@BHFS.com> wrote:

No, just a side project.

Trying to make a dent in what I see as a serious problem.

We have a call tomorrow, correct?

Sent from my iPhone

On Aug 4, 2016, at 7:26 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

Ah. I thought you were leaving us.

Best,

Johnny Amaral

On Aug 4, 2016, at 3:55 PM, Smith, Ryan A. <RSmith@BHFS.com> wrote:

Side project I am working to raise money for tribes without running water.

Sent from my iPhone

On Aug 4, 2016, at 6:54 PM, Johnny Amaral
<jamaral@westlandswater.org> wrote:

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From: Smith, Ryan A.
Sent: Thursday, August 4, 2016 4:38 PM
To: Johnny Amaral
Subject: Re: RedCanyon?

Indeed I do. Talk to you then.

Sent from my iPhone

On Aug 4, 2016, at 7:37 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

Yes we are. Bernhardt said that he's unavailable but that you know the code to activate the 10 AM call.

Best,

Johnny Amaral

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From: Jon Rubin
Sent: Thursday, August 4, 2016 5:40 PM
To: holly@mosaicassociates.net
CC: pwilliams@westlandswater.org
Subject: Fwd: Delta conditions report
Attachments: 2016-8-4-DeltaConditionsReport.docx; ATT00001.htm

Phil may want to be on the "to" list. Phill?

Begin forwarded message:

From: "Holly Long" <holly@mosaicassociates.net>
To: "Ara Azhderian" <ara.azhderian@sldmwa.org>, "Carolyn Jensen" <cjensen@ka-pow.com>, "Chris White" <cwhite@ccidwater.org>, "David Bernhardt" <DBernhardt@BHFS.com>, "Dennis Cardoza" <dcardoza@foley.com>, "Frances Brewster" (FBrewster@valleywater.org) <FBrewster@valleywater.org>, "Frances Mizuno" <frances.mizuno@sldmwa.org>, "Jason Nishijima" <JNishijima@valleywater.org>, "Jason Peltier" <jason.peltier@sldmwa.org>, "Jon Rubin" <Jon.Rubin@sldmwa.org>, "Judy Bendix" <jbendix@mosaicassociates.net>, "O'Hanlon, Daniel" <dohanlon@kmtg.com>, "sfong@sfcwa.org" <sfong@sfcwa.org>, "Sheila Greene" (sgreene@westlandswater.org) <sgreene@westlandswater.org>, "Steve Chedester" <stevechedester@sirecwa.net>, "Tom Boardman" (tboardman@apex.net) <tboardman@apex.net>
Subject: Delta conditions report

Hi everyone,

The Delta conditions report is attached.

Thank you,
Holly

Holly Long
Mosaic Associates
1690 San Pablo Avenue, Suite D
Pinole, CA 94564
holly@mosaicassociates.net
510.964.0394 office
510.964.0396 fax
[REDACTED] cell

DELTA CONDITIONS REPORT, AUGUST 4, 2016

Holly Long, SLDMWA

EXECUTIVE SUMMARY

- Operational constraint: Salinity management.
 - X2 today is >81 km (east of Collinsville).
 - Scheduled combined exports today are 8,830 cfs.
 - Outflow index today is ~7,800 cfs.
 - Yesterday's CDEC OMR values were -9,556 cfs (daily), -9,366 (5-day), -8,401 (14-day).
 - % inflow diverted today is 41.8% (3-day average).
- Salvage and ITLs
 - Delta smelt, adult salvage (8/3): 21.4% of ITL
 - Delta smelt, juvenile salvage (8/3): 2.0% of ITL
 - Longfin smelt, salvage (8/3): 10
 - Winter-run Chinook, non-clipped loss: Based on genetic assignment (through 2/25), 1.1% of ITL. Including Winter-run sized Chinook salvaged from 2/26–8/3, 1.7% of ITL.
 - Winter-run Chinook, clipped loss (8/3): 0.7% of ITL
 - Spring-run Chinook (i.e. surrogates), loss (6/5): 16.6%, 27.8%, and 41.2% of ITLs for three release groups
 - Steelhead, non-clipped salvage (8/3): 4.0% of ITL
- Surveys/monitoring
 - **Delta smelt**, most recent surveys:
 - 20mm Survey: #9 (7/5–7/7)—still processing: Postlarval-juvenile delta smelt caught in the confluence and Grizzly Bay so far. Most samples are processed.
 - Summer Townet: #3 (7/11–7/15). No delta smelt were collected.
 - Bay Study: May Midwater Trawl caught no delta smelt.
 - **Longfin smelt**, most recent surveys:
 - 20mm Survey: #9 (7/5–7/7)—still processing: No postlarval-juvenile longfin smelt caught so far. Most samples are processed.
 - Summer Townet: #3 (7/11–7/15). No longfin smelt were collected.
 - Bay Study, age-0 to age-2: May Midwater Trawl found age-0 longfin smelt in Suisun, San Pablo, and San Francisco Bays. The Otter Trawl caught age-0 fish in Carquinez Strait, San Pablo Bay, and San Francisco Bay.

DELTA CONDITIONS REPORT, AUGUST 4, 2016

DELTA SMELT

- Salvage:

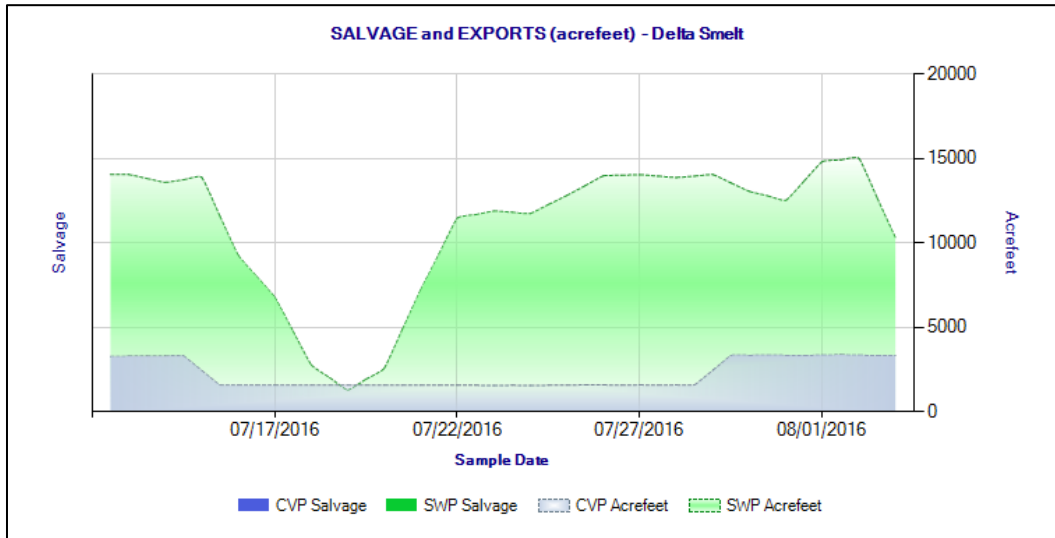


Figure: Recent delta smelt salvage (adults and juveniles) at both facilities (none in time period shown).

Salvage dates were 1/21 (CVP), 2/18 (SWP), 2/22 (CVP), 4/15 (CVP), 4/28 (SWP). Data through 8/3.

	Combined salvage as of 8/3/16	Concern level for WY 2016	ITL for WY 2016
Adult	12	42	56
Juvenile	8	261	392

- Larvae sampling began at the salvage facilities on 3/1. No delta smelt larvae caught at SWP (as of 6/8) or CVP (as of 6/7). Larval sampling has ended for the water year.

- **20-mm Survey:**

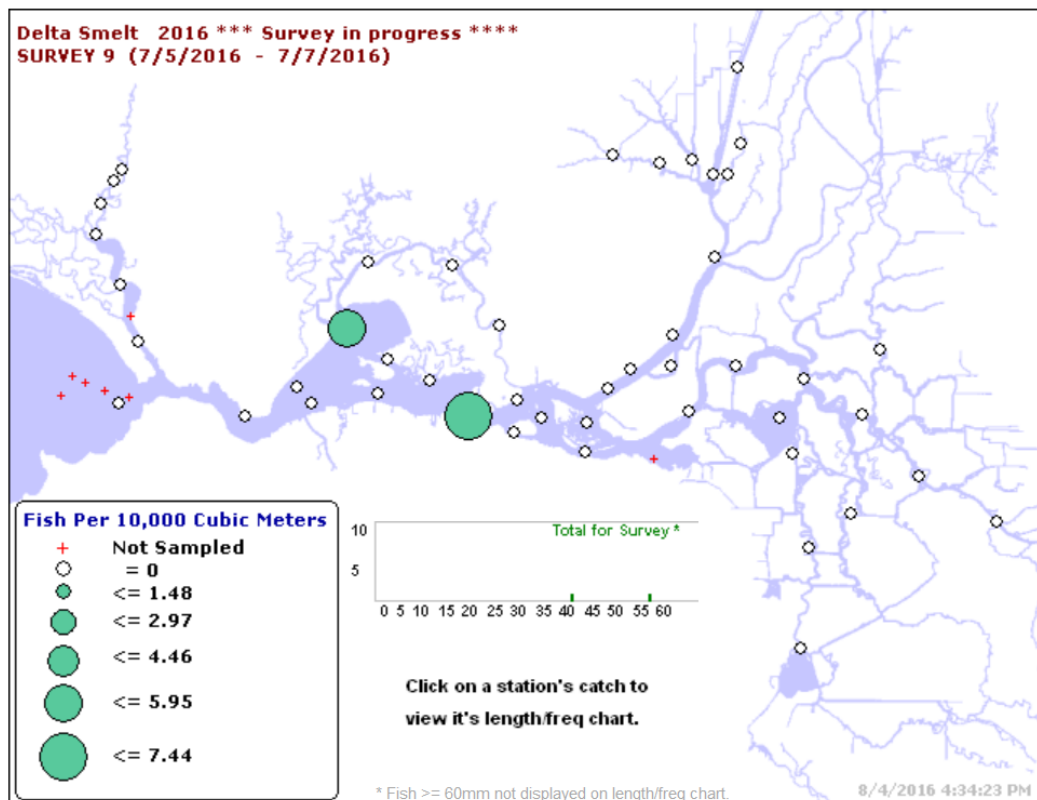


Figure: 20mm Survey #9 (7/5–7/7)—still processing. So far, postlarval-juvenile delta smelt were found in the confluence and Grizzly Bay. The station samples that have not been processed are red crosses. In the survey two weeks before (also still processing), delta smelt were caught in the SDWSC, lower Sacramento, and confluence.

- This was the last 20mm Survey of the season.

- **Summer Towntet:**

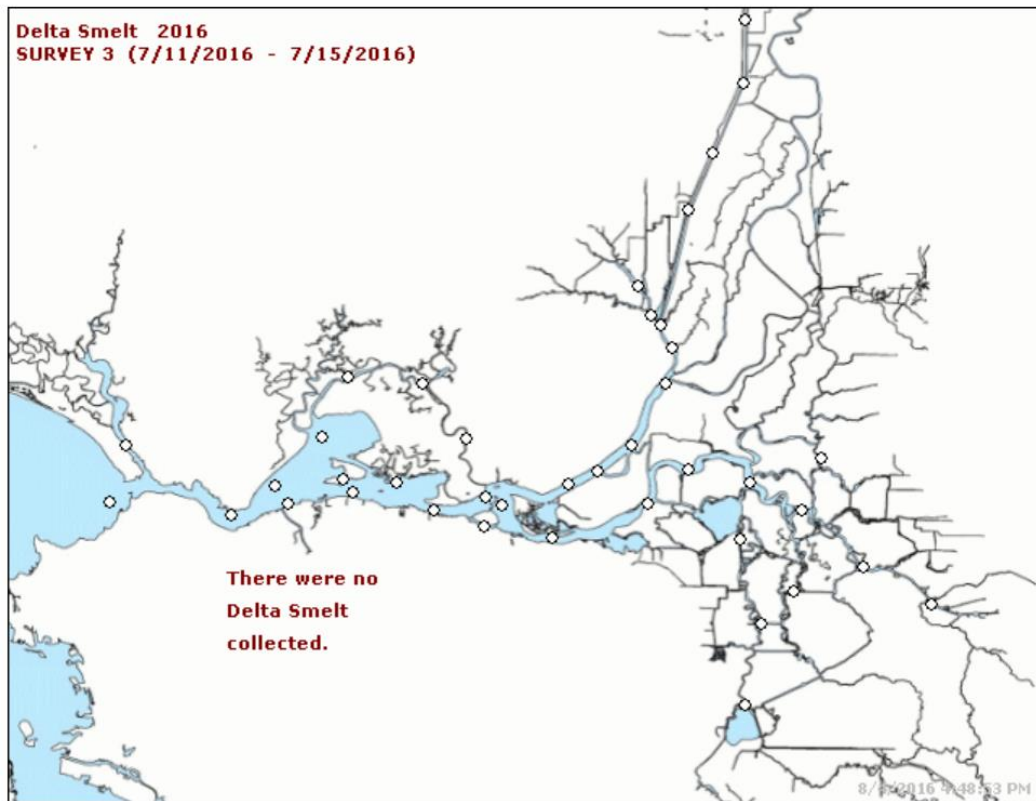


Figure: Summer Townet #3 (7/11–7/15). No delta smelt were collected. Two weeks before in survey #2, there were also no delta smelt collected. In the first survey (6/13–6/17), delta smelt were caught in the SDWSC, the confluence, and Suisun Marsh.

- **Bay Study:**
 - There was no Bay Study sampling in February, March, or April (SWG notes, 5/2/16).

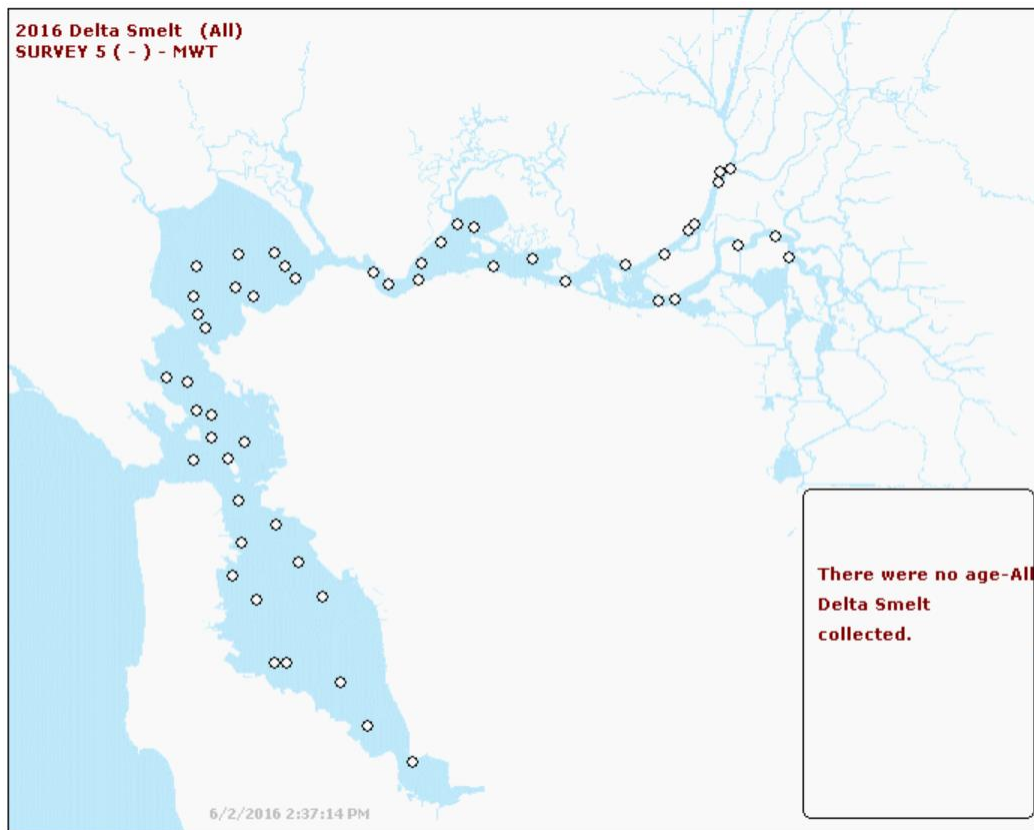


Figure: Monthly Mid water trawl (pelagic), Survey 5 (May). No delta smelt were caught in May.

LONGFIN SMELT

- Salvage:

- Salvage of 10 longfin smelt this WY (as of 8/3). Salvage has been juveniles, not adults (SWG notes, 5/9/16).
- Larvae sampling began at the salvage facilities on 3/1. No longfin smelt larvae caught at SWP (as of 6/8). Larvae caught at CVP on 3/16 (as of 6/7). Larval sampling has ended for the water year.

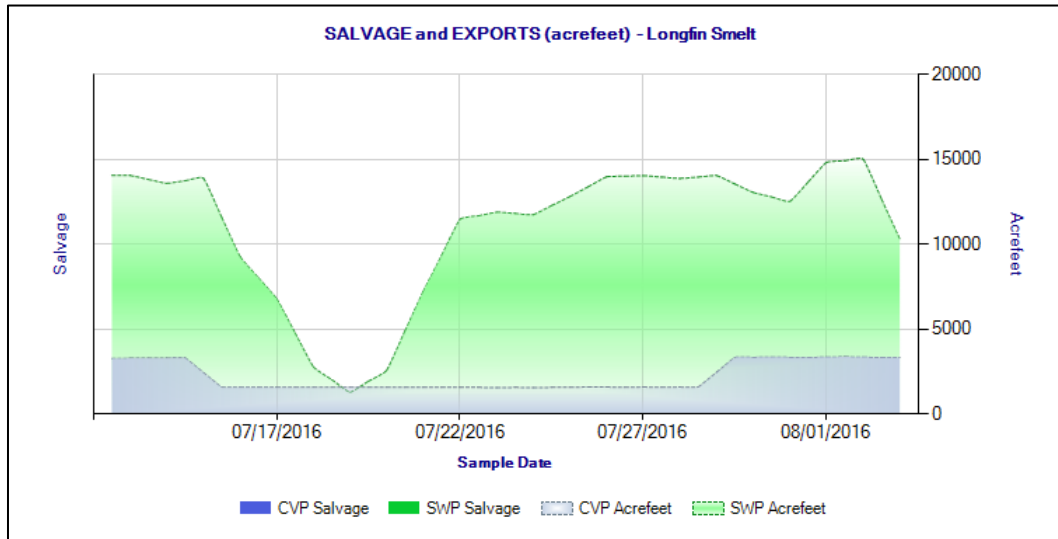


Figure: Recent longfin smelt salvage at both facilities (none in the time frame shown). Salvage dates were 3/9 (SWP), 3/11 (CVP). Data through 8/3.

- **20-mm Survey:**

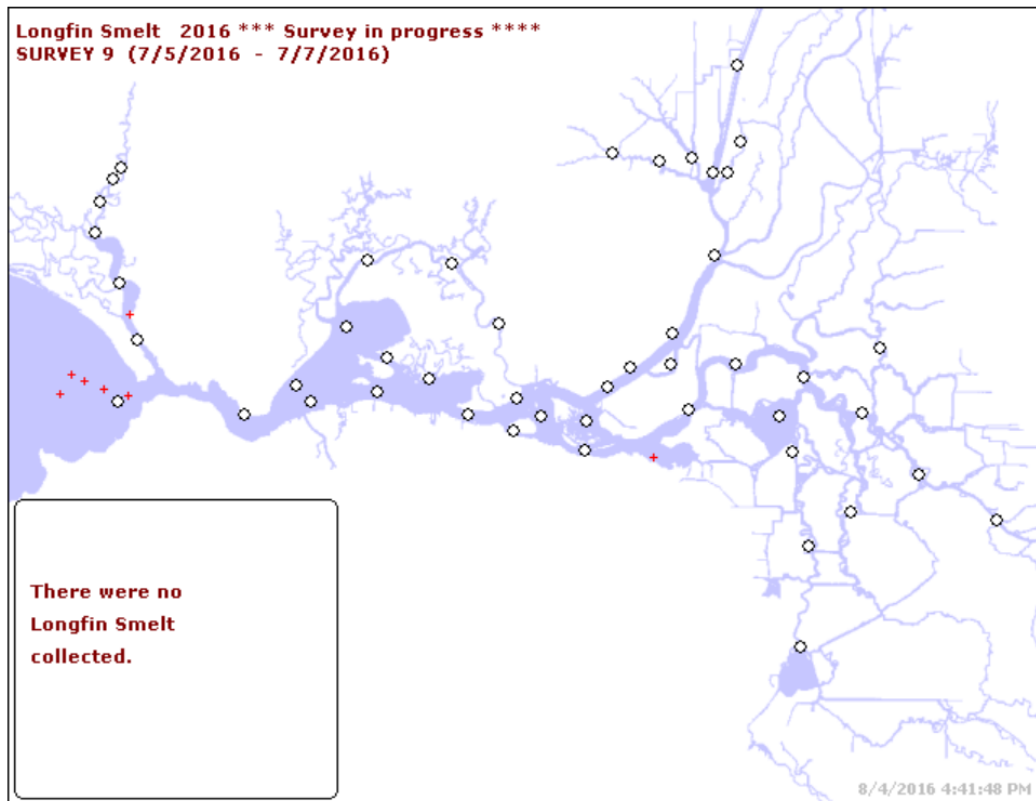


Figure: 20mm Survey #9 (7/5–7/7)—still processing. So far, no postlarval-juvenile longfin smelt have been found. The station samples that have not been processed are red crosses. In the survey two weeks before (also still processing), longfin smelt were found at the confluence and in Suisun Bay.

- This was the last 20mm Survey of the season.

- **Summer Towntet:**

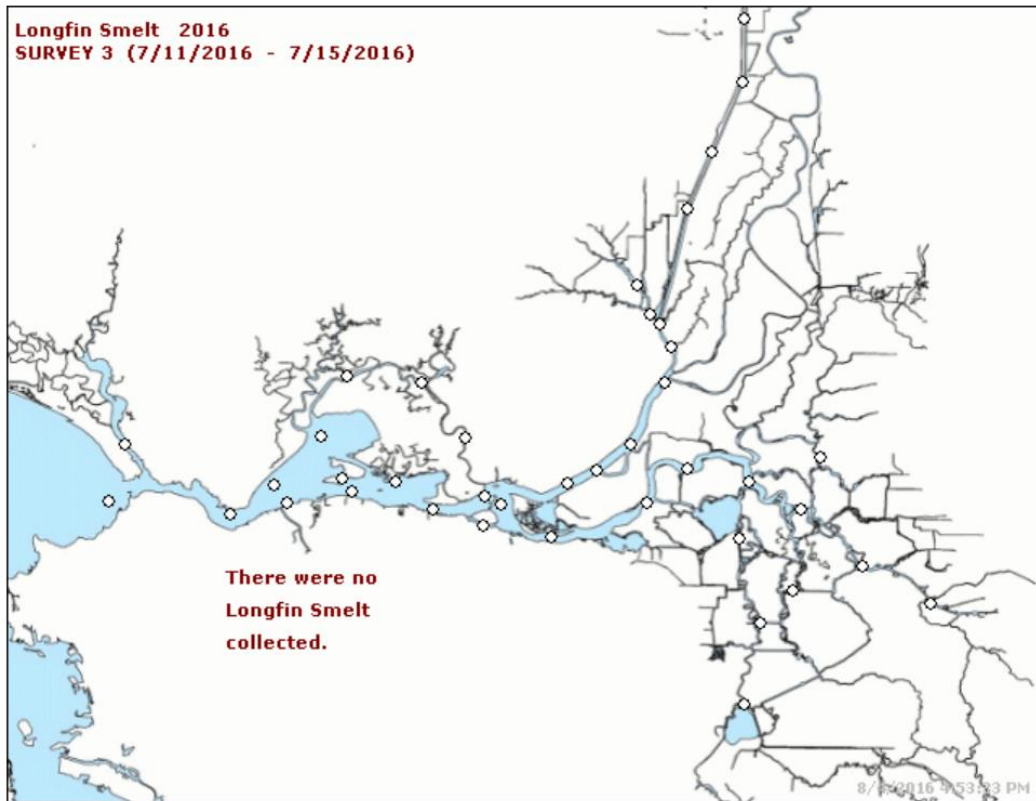


Figure: Summer TOWNET #3 (7/11–7/15). No longfin smelt were collected. Two weeks before in survey #2, longfin smelt were caught in Suisun Marsh. In the first survey (6/13–6/17), no longfin smelt were caught.

- **Bay Study:**
 - There was no Bay Study sampling in February, March, or April (SWG notes, 5/2/16).

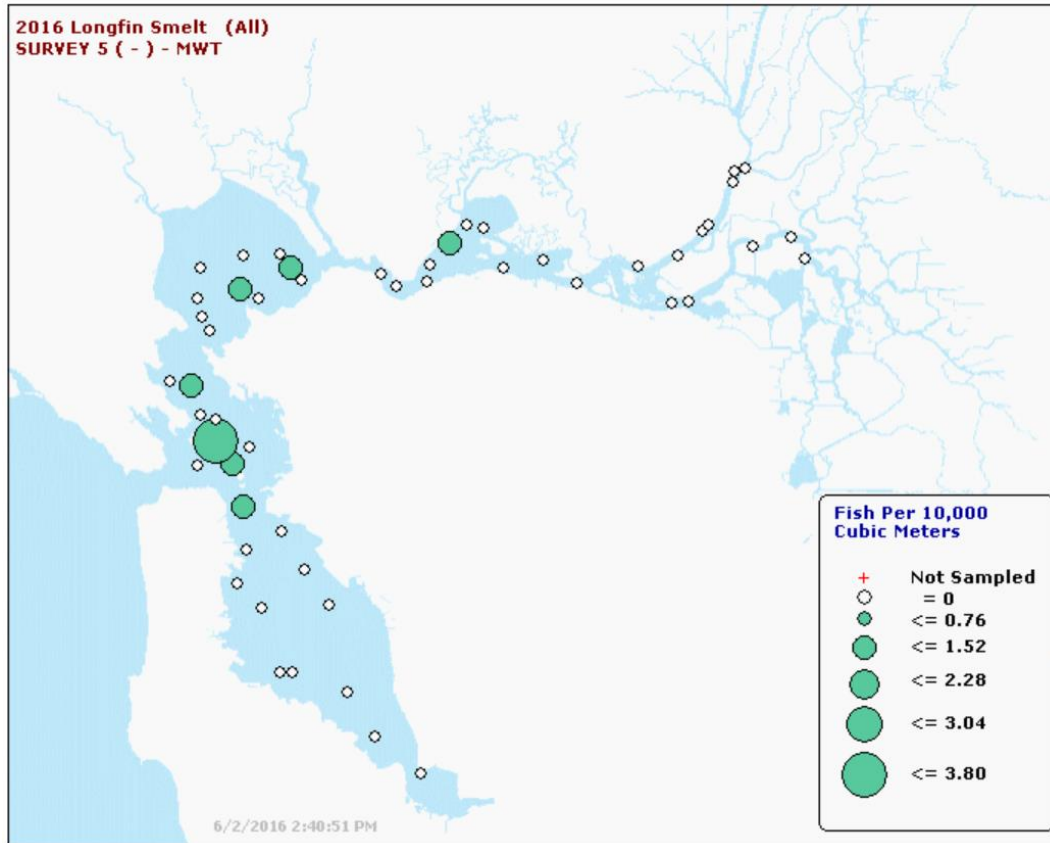


Figure: Monthly Mid water trawl (pelagic), Survey 5 (May). Age-0 longfin smelt were caught in Suisun, San Pablo, and San Francisco Bays.

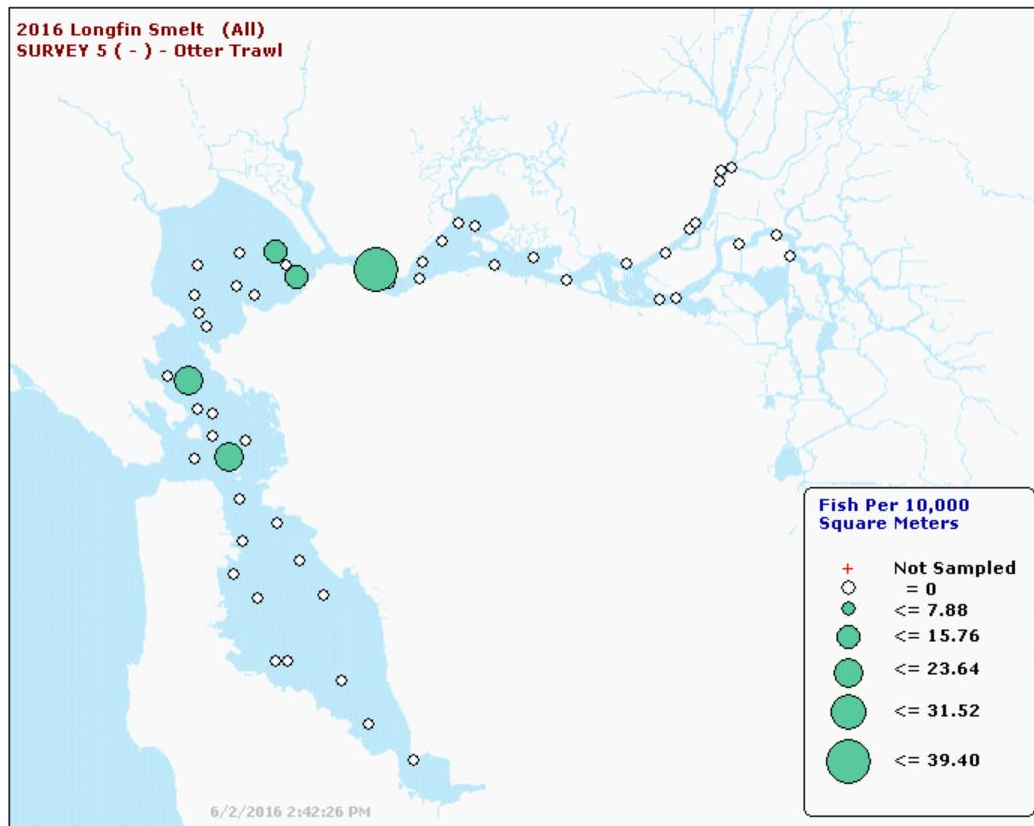


Figure: Monthly otter trawl (demersal/bottom), Survey 5 (May). Age-0 longfin smelt were caught in the Carquinez Strait, eastern San Pablo Bay, and San Francisco Bay.

CHINOOK SALMON

- **Salvage:**

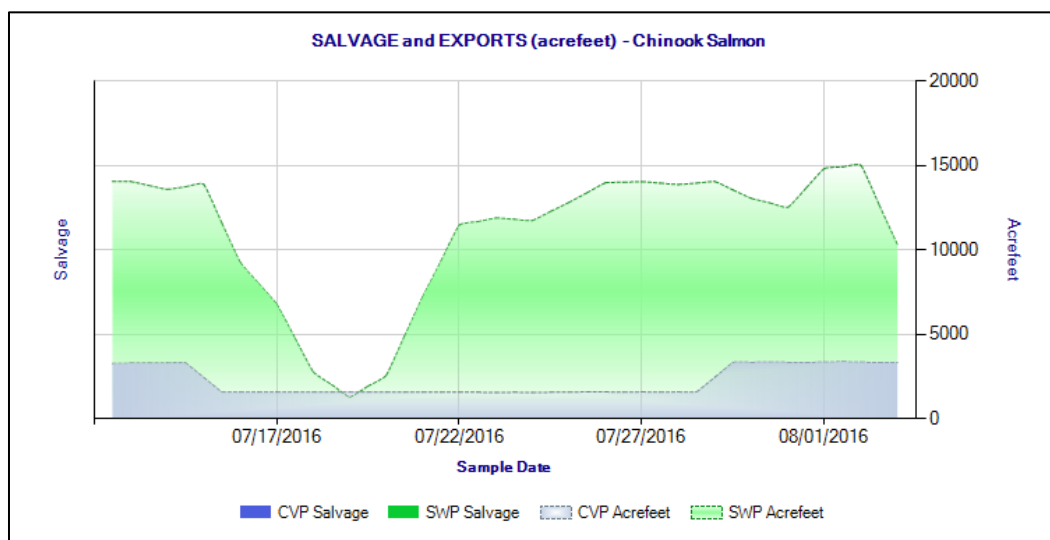


Figure: Recent Chinook salmon salvage at both facilities (all races; none in the time frame shown). Salvage dates for genetic non-clipped Winter-run were 1/28 (SWP) and 2/22 (CVP); salvage dates for non-clipped Winter-run sized Chinook from after the last genetic testing were 3/21 and 3/22 (CVP). Salvage dates for clipped Winter-run were 3/6, 3/9, 3/14 (CVP). Salvage for Spring-run surrogates began 12/25/15. Data through 8/3.

	Winter-run cumulative combined loss	Winter-run concern level for WY 2016	<u>Winter-run ITL</u> for WY 2016
Non-clipped*, sum based on genetic assignment through 2/25 and length-at-date assignment from 2/26–8/3	17.23	508	1,017
Clipped (as of 8/3)	11.18	777	1,554

* Non-clipped/wild Winter-run ITL is based on genetic race assignment now. Thus, the ITL is 1% of the JPE rather than the former 2% which accounted for errors in the length-at-date assignments (2016 NMFS JPE letter). This row accounts for genetic assignment completed through the date given and uses length-at-date for Winter-run sized fish salvaged since then. See March 8, 2016 DOSS notes for genetic results at http://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/Water%20Operations/Delta%20Operations%20for%20Salmonids%20and%20Sturgeon/DOSS%20WY2016/2016.03.08_final_doss_notes.pdf.

Coleman NFH Late-fall-run surrogate group	Released spring-run surrogates	Cumulative combined loss as of 6/5/16	Spring-run surrogate concern level WY 2015 (0.5%)	Spring-run surrogate ITL WY 2015 (1%)
12/11/15 release	77,000	128.05	385	770
12/22/15 release	68,000	188.93	340	680
1/12/16 release	67,700	278.65	338.5	677

STEELHEAD

- Salvage:**

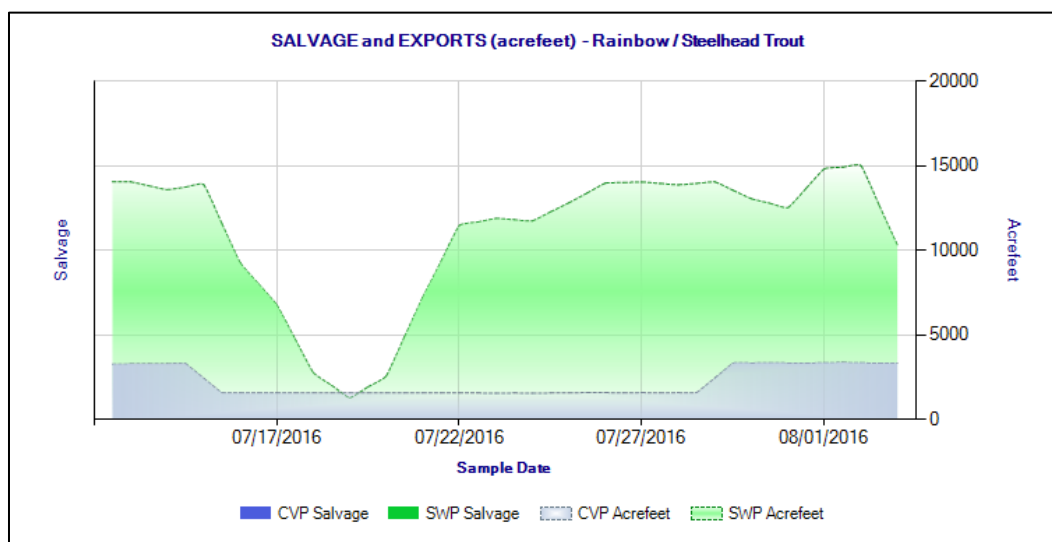


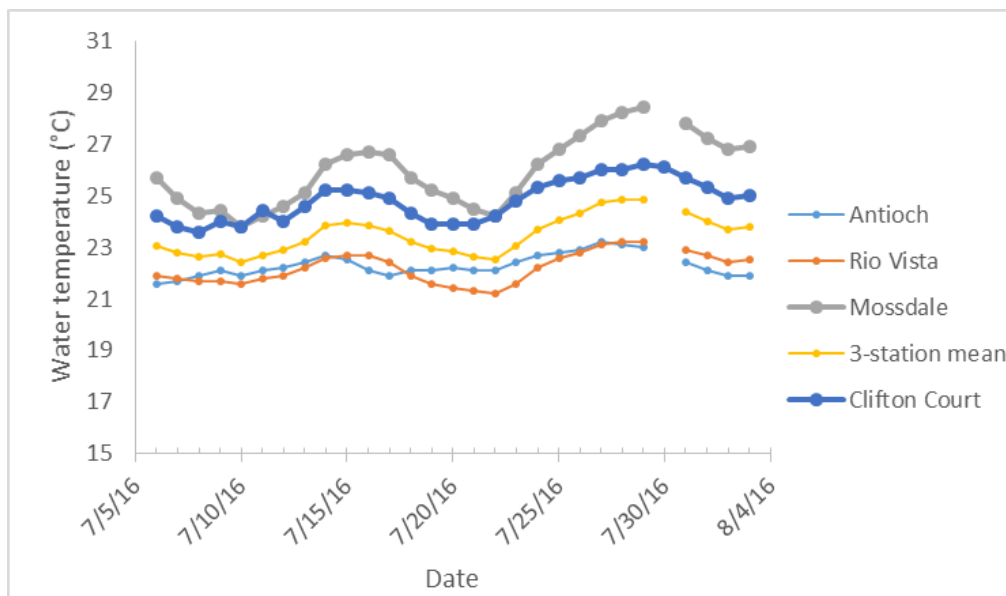
Figure: Recent steelhead salvage at both facilities (clipped and non-clipped; none in time period shown).

Salvage dates for non-clipped steelhead were 1/20 (CVP), 2/1 (SWP), 2/2, 2/4, 2/9 (CVP), 2/16 (SWP), 2/19, 2/20 (CVP), 2/26 (SWP), 3/11, 3/12 (CVP), 3/14 (SWP), 3/15 (SWP, CVP), 3/16 (SWP), 3/17, 3/18 (CVP), 3/20 (SWP), 3/25 (SWP, CVP), 3/26 (SWP), 3/30 (SWP), 3/31 (SWP), 4/3 (SWP), 4/10, 4/12 (CVP), 5/2, 5/4, 5/23 (SWP). Data through 8/3.

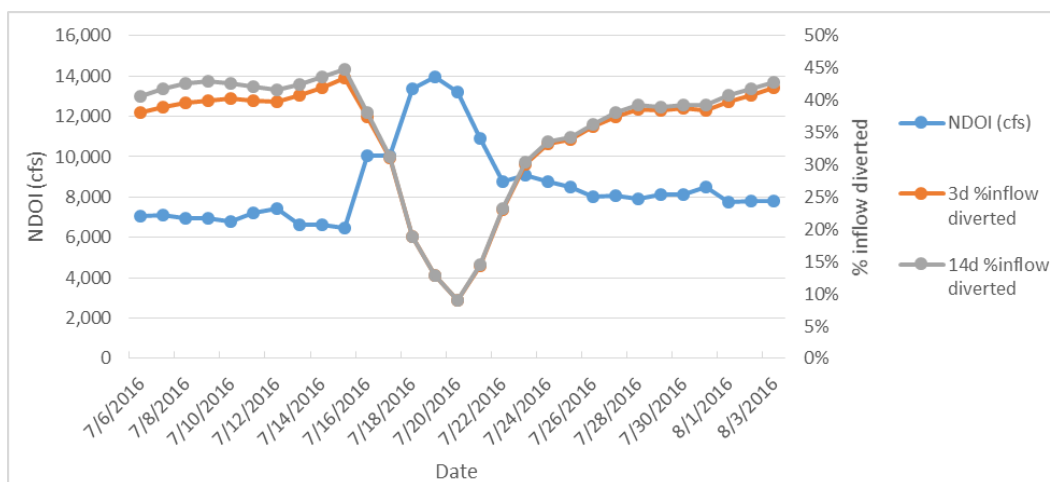
	Cumulative combined salvage for WY 2016 as of 8/3/16	Concern level	Steelhead ITL
Non-clipped, adults and juveniles	119	1,500	3,000

PHYSICAL CONDITIONS

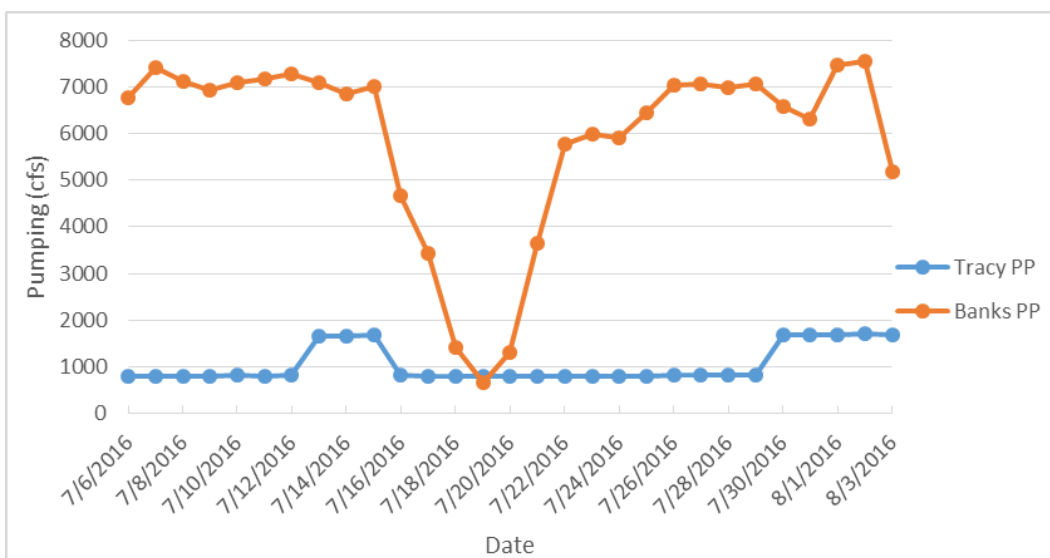
- Currently controlling operations: Salinity management.
- Location of X2, 8/4: >81 km (east of Collinsville).
- DCC status, 8/4: Open.
- Turbidity (at sites in delta smelt BiOp)
 - Three-day mean Prisoner's Point: 4.8 NTU on 8/3
 - Three-day mean Holland Cut: 3.1 NTU on 8/3
 - Three-day mean Victoria Canal: 6.0 NTU on 8/3
- South Delta temporary barriers update: July 29 (Email from Michael Abiouli, DWR, 7/29)
 - Old River at Tracy barrier flap gates are tidally operating, since 4/1.
 - Middle River barrier flap gates are tidally operating, since 4/1. DWR raised the crest of the barrier by one foot on 6/22 for irrigation demands.
 - Grant Line Canal barrier was partially closed on 4/14 and fully closed on 6/8. All flap gates operate tidally as of 6/17.
- Water Supply Index (WSI) forecast: May 1 forecast date (Water Supply Index (WSI) Forecast email, Andrew Reising, DWR, 5/9—last update for the water year)
 - 50% exceedance for Sacramento River Unimpaired Runoff WY forecast: 18.6 MAF (102% of average)
 - Forecasted 50% exceedance for Sacramento Valley Index is 7.1 (Below Normal).
 - Forecasted 75% exceedance for San Joaquin Valley Index is 2.4 (Dry).
- Temperature



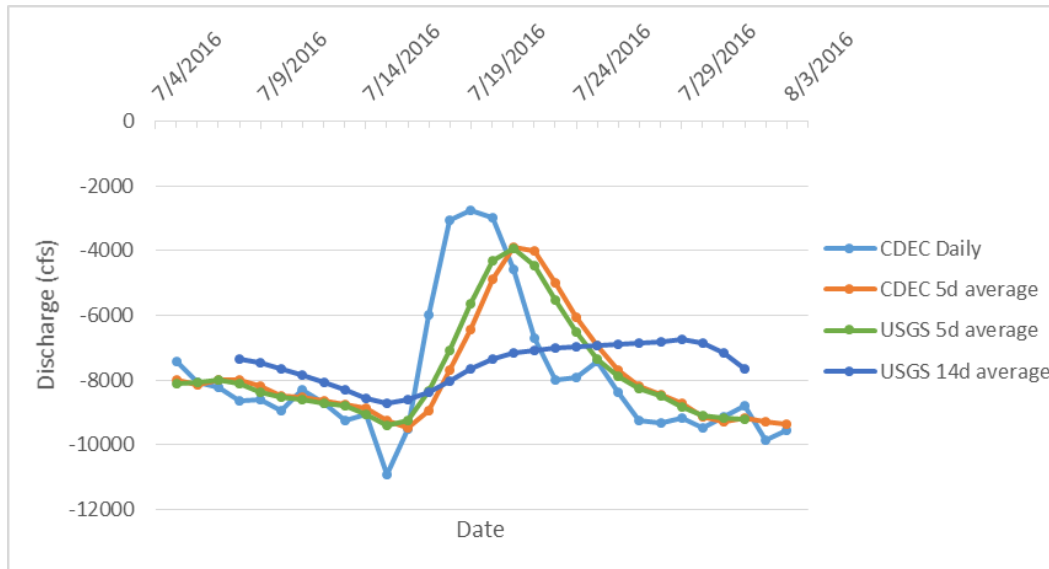
- Delta outflow index as of 8/4: ~7,800 cfs
 - August monthly outflow requirement is 4,000 cfs (based on Below Normal Sacramento Valley water year classification), with a 7-day average not less than 3,000 cfs. Status as of 8/3 is 7,785 cfs and 7,785 cfs, respectively.
 - No August X2 requirements.
- Total Delta inflow as of 8/4: ~20,983 cfs
 - Sacramento flow: 19,771 cfs
 - San Joaquin flow: 224 cfs
 - % inflow diverted (3-day average): 41.8%.
 - For % inflow diverted, July–January standard is 65%.



- Exports:
 - 8/4 scheduled exports: 7,180 cfs Clifton Court inflow; 1,650 cfs Jones/Tracy PP.



- Tidally-filtered OMR:



REGULATORY

- Delta smelt
 - Current RPAs: n/a.
- Longfin smelt
 - Current RPAs: n/a.
- Salmonids
 - Current RPAs: n/a.

From: Philip Williams
Sent: Thursday, August 4, 2016 10:00 PM
To: Jon Rubin
CC: holly@mosaicassociates.net
Subject: Re: Delta conditions report

I would, yes; thanks!

Philip A. Williams
Deputy General Counsel
Westlands Water District
Office: 916-321-4207
Cell: 931-████-████

(Sent from my iPhone)

On Aug 4, 2016, at 5:38 PM, Jon Rubin <Jon.Rubin@sldmwa.org> wrote:

Phil may want to be on the "to" list. Phill?

Begin forwarded message:

From: "Holly Long" <holly@mosaicassociates.net<<mailto:holly@mosaicassociates.net>>>
To: "Ara Azhderian" <ara.azhderian@sldmwa.org<<mailto:ara.azhderian@sldmwa.org>>>, "Carolyn Jensen" <cjensen@ka-pow.com<<mailto:cjensen@ka-pow.com>>>, "Chris White" <cwhite@ccidwater.org<<mailto:cwhite@ccidwater.org>>>, "David Bernhardt" <DBernhardt@BHFS.com<<mailto:DBernhardt@bhfs.com>>>, "Dennis Cardoza" <dcardoza@foley.com<<mailto:dcardoza@foley.com>>>, "Frances Brewster" <FBrewster@valleywater.org<<mailto:FBrewster@valleywater.org>>>)" <FBrewster@valleywater.org<<mailto:FBrewster@valleywater.org>>>, "Frances Mizuno" <frances.mizuno@sldmwa.org<<mailto:frances.mizuno@sldmwa.org>>>, "Jason Nishijima" <JNishijima@valleywater.org<<mailto:JNishijima@valleywater.org>>>, "Jason Peltier" <jason.peltier@sldmwa.org<<mailto:jason.peltier@sldmwa.org>>>, "Jon Rubin" <Jon.Rubin@sldmwa.org<<mailto:Jon.Rubin@sldmwa.org>>>, "Judy Bendix" <jbendix@mosaicassociates.net<<mailto:jbendix@mosaicassociates.net>>>, "O'Hanlon, Daniel" <dohanlon@kmtg.com<<mailto:dohanlon@kmtg.com>>>, "sfong@sfcwa.org<<mailto:sfong@sfcwa.org>>>" <sfong@sfcwa.org<<mailto:sfong@sfcwa.org>>>, "Sheila Greene" <sgreene@westlandswater.org<<mailto:sgreene@westlandswater.org>>>)" <sgreene@westlandswater.org<<mailto:sgreene@westlandswater.org>>>, "Steve Chedester" <stevechedester@sjrecwa.net<<mailto:stevechedester@sjrecwa.net>>>, "Tom Boardman" <tboardman@apex.net<<mailto:tboardman@apex.net>>>)" <tboardman@apex.net<<mailto:tboardman@apex.net>>>
Subject: Delta conditions report

Hi everyone,

The Delta conditions report is attached.

Thank you,
Holly

Holly Long
Mosaic Associates
1690 San Pablo Avenue, Suite D
Pinole, CA 94564
holly@mosaicassociates.net<<mailto:holly@mosaicassociates.net>>
510.964.0394 office
510.964.0396 fax
[REDACTED] cell

<2016-8-4-DeltaConditionsReport.docx>

From: Johnny Amaral

Sent: Monday, August 8, 2016 7:41 AM

To: Ryan A. ' 'Smith; Mike Burns; Ed Manning; Denny Rehberg; Dennis Cardoza; David Bernhardt; Catherine Karen; Carolyn Jensen

Subject: Reminder

As you may recall from the call on Friday, I will be with an LA Times reporter doing an aerial tour of the CVP today. Therefore there will be no calls today

Best,

Johnny Amaral

From: Bernhardt, David L.
Sent: Monday, August 8, 2016 7:43 AM
To: Johnny Amaral
Subject: Re: Reminder

Thanks.

David Bernhardt

> On Aug 8, 2016, at 10:40 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:
>
>
> As you may recall from the call on Friday, I will be with an LA Times reporter doing an aerial tour of the CVP today. Therefore
there will be no calls today
>
> Best,
>
> Johnny Amaral
>
>

STATEMENT OF CONFIDENTIALITY & DISCLAIMER: The information contained in this email message is attorney privileged and confidential, intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this email is strictly prohibited. If you have received this email in error, please notify us immediately by calling (303)-223-1300 and delete the message. Thank you.

From: Johnny Amaral
Sent: Tuesday, August 9, 2016 11:20 AM
To: Cannon Michael; David Bernhardt; Dennis Cardoza
Subject: DC trips

Gents,

Can we hop on a call in the next couple of days to try to map out a plan that makes sense for September. Its going to require some recruitment of attendees and coordination between all the water agencies and their lobbyists in DC.

Thoughts on when we can hop on a call and WHO to invite to participate in the call?

From: Bernhardt, David L.
Sent: Tuesday, August 9, 2016 11:25 AM
To: 'Johnny Amaral'; Cannon Michael; Dennis Cardoza
Subject: RE: DC trips

Johnnie:

I can be available at any time except 9-10:30 Pacific tomorrow, and 9-9:30, and 1-1:30 Pacific on Thursday.

Best,
David

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Tuesday, August 09, 2016 2:20 PM
To: Cannon Michael; Bernhardt, David L.; Dennis Cardoza
Subject: DC trips

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From: DCardoza@foley.com
Sent: Tuesday, August 9, 2016 12:31 PM
To: Johnny Amaral
CC: Cannon Michael; David Bernhardt
Subject: Re: DC trips

Hi Johnny. I am free after 10:30 on Wednesday. Thursday I am having my retina laser re-attached in one small spot. Don't know how long the recovery is or if I can resume normal activities right away. In any case Wednesday is safe for me.

Dennis

Sent from my iPhone

Please excuse any auto correct errors

On Aug 9, 2016, at 2:21 PM, Johnny Amaral <jamaral@westlandswater.org<<mailto:jamaral@westlandswater.org>>> wrote:

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From: Johnny Amaral
Sent: Tuesday, August 9, 2016 2:11 PM
To: DCardoza@foley.com
CC: 'Cannon Michael'; 'David Bernhardt'
Subject: RE: DC trips

My dad just had surgery for a detached retina a month ago. Be ready to have your head down for WEEKS. Literally

-----Original Message-----

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From: DCardoza@foley.com
Sent: Tuesday, August 9, 2016 2:15 PM
To: 'Johnny Amaral'
Subject: RE: DC trips

No it did not come detached. And just needs a little tag weld according to the Eye doc, just don't know the short term recovery....

-----Original Message-----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Tuesday, August 09, 2016 5:11 PM
To: Cardoza, Dennis A.
Cc: 'Cannon Michael'; 'David Bernhardt'
Subject: RE: DC trips

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To: Johnny Amaral <jamaral@westlandswater.org>
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From: Cannon Michael
Sent: Monday, August 15, 2016 9:10 AM
To: dcardoza@foley.com; Johnny Amaral
CC: David Bernhardt
Subject: Re: DC trips

Guys sorry for being out of touch lately. Just got done moving the family over to Fresno.

Did you guys have a call regarding the trips? Let me know if I can be of any assistance. We should start the coordination process soon.

Sincerely,

Cannon Michael
Bowles Farming Company, Inc.
209-769-6777
www.bfarm.com
@agleader

On Tue, Aug 9, 2016 at 2:12 PM -0700, "Johnny Amaral" <jamaral@westlandswater.org> wrote:

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</jamaral@westlandswater.org

From: Johnny Amaral
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To: 'Cannon Michael'; dcardoza@foley.com
CC: 'David Bernhardt'
Subject: RE: DC trips

Lets aim for tomorrow sometime. Morning ok?

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</jamaral@westlandswater.org

From: DCardoza@foley.com
Sent: Monday, August 15, 2016 10:29 AM
To: Johnny Amaral
CC: Cannon Michael; David Bernhardt
Subject: Re: DC trips

Yes. I have a 1 pm call already otherwise I am free at this time. On bit of bad news, I have to have another Knee replacement surgery. Hurt the good one this weekend so they scheduled it for Sept 1. Trying to get them to move it forward from there as I'm in a lot of pain. My team will be available to support the fly in but my participation depends on recovery.

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Subject: Re: DC trips

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Does tomorrow at 8 am PST work?

Sincerely,

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209-752-7792 (Direct)
www.bfarm.com
[@agleader](#)

Please consider the Environment before printing this email.

=====

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Bowles Farming Company
209-752-7792 (Direct)
www.bfarm.com<https://urldefense.proofpoint.com/v2/url?u=http-3A__www.bfarm.com&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t0O7w&m=HdVWECCWLFFYVY3NZ8CMzLzFD4u-ipGHQZOmUtc8E6Q&s=k1HjUOWY-g9yvzdg4YOL5aI7r8PkUdoHEsM9rKWJjXA&e=>>
<agleader<https://urldefense.proofpoint.com/v2/url?u=https-3A__twitter.com_agleader&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t0O7w&m=HdVWECCWLFFYVY3NZ8CMzLzFD4u-ipGHQZOmUtc8E6Q&s=x3JOM5rBN4oh6r83dRXODFSLtuJfOTh6iUt2hbF63i4&e=>>

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=====

On Mon, Aug 15, 2016 at 10:29 AM, DCardoza@foley.com<<mailto:DCardoza@foley.com>>

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Yes. I have a 1 pm call already otherwise I am free at this time. On bit of bad news, I have to have another Knee replacement surgery. Hurt the good one this weekend so they scheduled it for Sept 1. Trying to get them to move it forward from there as I'm in a lot of pain. My team will be available to support the fly in but my participation depends on recovery.

Dennis

Sent from my iPhone

Please excuse any auto correct errors

On Aug 15, 2016, at 12:13 PM, Johnny Amaral

<jamaral@westlandswater.org<<mailto:jamaral@westlandswater.org>><<mailto:jamaral@westlandswater.org><<mailto:jamaral@westlandswater.org>>>> wrote:

Lets aim for tomorrow sometime. Morning ok?

From: Cannon Michael [<mailto:cannon@bfarm.com><<mailto:cannon@bfarm.com>>]

Sent: Monday, August 15, 2016 9:10 AM

To: dcardoza@foley.com<<mailto:dcardoza@foley.com>><<mailto:dcardoza@foley.com><<mailto:dcardoza@foley.com>>>>; Johnny Amaral

<jamaral@westlandswater.org<<mailto:jamaral@westlandswater.org>><<mailto:jamaral@westlandswater.org><<mailto:jamaral@westlandswater.org>>>>

Cc: David Bernhardt

<dbernhardt@bhfs.com<<mailto:dbernhardt@bhfs.com>><<mailto:dbernhardt@bhfs.com><<mailto:dbernhardt@bhfs.com>>>>

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From: Johnny Amaral
Sent: Monday, August 15, 2016 1:17 PM
To: DCardoza@foley.com
CC: 'Cannon Michael'; 'David Bernhardt'
Subject: RE: DC trips

Robo Dennis.....

-----Original Message-----

From: DCardoza@foley.com [<mailto:DCardoza@foley.com>]
Sent: Monday, August 15, 2016 10:29 AM
To: Johnny Amaral <jamaral@westlandswater.org>
Cc: Cannon Michael <cannon@bfarm.com>; David Bernhardt <dbernhardt@bhfs.com>
Subject: Re: DC trips

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www.bfarm.com<https://urldefense.proofpoint.com/v2/url?u=http-3A__www.bfarm.com&d=DOMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t007w&m=Os6LDPMUY91o5GayDGA5SjlXp1_Pfya1H6XD5tOQoaA&s=yX0W8YCH0DCZdKICj1tOu8TL7QR9iCeoH9GNbOmO000&e=>>
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Sent from my iPhone

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[3A_www.bfarm.com&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t007w&m=Os6LDPMUY91o5GayDGa5SjlXp1_Pfya1H6XD5tOQoaA&s=yX0W8YCH0DCZdKICj1tOu8TL7QR9iCeoH9GNbOm0000&e=>](https://urldefense.proofpoint.com/v2/url?u=http-3A_www.bfarm.com&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t007w&m=Os6LDPMUY91o5GayDGa5SjlXp1_Pfya1H6XD5tOQoaA&s=yX0W8YCH0DCZdKICj1tOu8TL7QR9iCeoH9GNbOm0000&e=>)

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From: Johnny Amaral
Sent: Monday, August 15, 2016 1:41 PM
To: DCardoza@foley.com
Subject: RE: DC trips

yes

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From: DCardoza@foley.com
Sent: Monday, August 15, 2016 2:08 PM
To: Johnny Amaral
Subject: Re: DC trips

Ok great thanks

Sent from my iPhone

Please excuse any auto correct errors

> On Aug 15, 2016, at 4:42 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

> yes

>

> -----Original Message-----

> From: DCardoza@foley.com [<mailto:DCardoza@foley.com>]

> Sent: Monday, August 15, 2016 1:34 PM

> To: Johnny Amaral <jamaral@westlandswater.org>

> Subject: Re: DC trips

>

> Yea bionic not! So is it 1 pacific and 4pm eastern? Dennis.

>

> Sent from my iPhone

>

> Please excuse any auto correct errors

>

>> On Aug 15, 2016, at 4:18 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>>

>> Robo Dennis.....

>>

>> -----Original Message-----

>> From: DCardoza@foley.com [<mailto:DCardoza@foley.com>]

>> Sent: Monday, August 15, 2016 10:29 AM

>> To: Johnny Amaral <jamaral@westlandswater.org>

>> Cc: Cannon Michael <cannon@bfarm.com>; David Bernhardt <dbernhardt@bhfs.com>

>> Subject: Re: DC trips

>>

>> Yes. I have a 1 pm call already otherwise I am free at this time. On bit of bad news, I have to have another Knee replacement surgery. Hurt the good one this weekend so they scheduled it for Sept 1. Trying to get them to move it forward from there as I'm in a lot of pain. My team will be available to support the fly in but my participation depends on recovery.

>>

>> Dennis

>>

>>

>> Sent from my iPhone

>>

>> Please excuse any auto correct errors

>>

>> On Aug 15, 2016, at 12:13 PM, Johnny Amaral <jamaral@westlandswater.org<<mailto:jamaral@westlandswater.org>>> wrote:

>>

>> Lets aim for tomorrow sometime. Morning ok?

>>

>> From: Cannon Michael [<mailto:cannon@bfarm.com>]

>> Sent: Monday, August 15, 2016 9:10 AM

>> To: dcardoza@foley.com<<mailto:dcardoza@foley.com>>; Johnny Amaral
<jamaral@westlandswater.org<<mailto:jamaral@westlandswater.org>>>

>> Cc: David Bernhardt <dbernhardt@bhfs.com<<mailto:dbernhardt@bhfs.com>>>

>> Subject: Re: DC trips

>>
>> Guys sorry for being out of touch lately. Just got done moving the family over to Fresno.
>>
>> Did you guys have a call regarding the trips? Let me know if I can be of any assistance. We should start the coordination process soon.
>>
>>
>> Sincerely,
>>
>> Cannon Michael
>> Bowles Farming Company, Inc.
>> 209-769-6777
>> www.bfarm.com<https://urldefense.proofpoint.com/v2/url?u=http-3A_www.bfarm.com&d=DOMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t0O7w&m=Os6LDPMUY91o5GayDGA5SjlXp1_Pfya1H6XD5tOQoaA&s=yX0W8YCH0DCZdKICj1tOu8TL7QR9iCeoH9GNbQmO000&e=>>
>> @agleader
>>
>>
>>
>> On Tue, Aug 9, 2016 at 2:12 PM -0700, "Johnny Amaral" <jamaral@westlandswater.org<<mailto:jamaral@westlandswater.org>>> wrote:
>>
>> My dad just had surgery for a detached retina a month ago. Be ready to have your head down for WEEKS. Literally
>>
>>
>>
>> -----Original Message-----
>>
>> From: DCardoza@foley.com<<mailto:DCardoza@foley.com>> [<mailto:DCardoza@foley.com>]
>>
>> Sent: Tuesday, August 9, 2016 12:31 PM
>>
>> To: Johnny Amaral
>>
>> Cc: Cannon Michael ; David Bernhardt
>>
>> Subject: Re: DC trips
>>
>>
>>
>> Hi Johnny. I am free after 10:30 on Wednesday. Thursday I am having my retina laser re-attached in one small spot. Don't know how long the recovery is or if I can resume normal activities right away. In any case Wednesday is safe for me.
>>
>>
>>
>> Dennis
>>
>>
>>
>> Sent from my iPhone
>>
>>
>>
>> Please excuse any auto correct errors
>>
>>
>>
>> On Aug 9, 2016, at 2:21 PM, Johnny Amaral <jamaral@westlandswater.org<<mailto:jamaral@westlandswater.org>>> wrote:
>>
>>
>>

>> Gents,

>>

>>

>>

>> Can we hop on a call in the next couple of days to try to map out a plan that makes sense for September. Its going to require some recruitment of attendees and coordination between all the water agencies and their lobbyists in DC.

>>

>>

>>

>> Thoughts on when we can hop on a call and WHO to invite to participate in the call?

>>

>>

>>

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>>

>>

>>

>> </jamaral@westlandswater.org<<mailto:jamaral@westlandswater.org>>

>>

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From: Johnny Amaral

Sent: Monday, August 29, 2016 8:27 AM

To: David Bernhardt; Ryan A. ' 'Smith; Denny Rehberg; Catherine Karen; Dennis Cardoza

Subject: No call today

Best,

Johnny Amaral

From: Bernhardt, David L.
Sent: Wednesday, August 31, 2016 11:21 AM
To: Johnny Amaral
Subject: For You and the Westlands Growers coming to DC

Importance: High

Johnny: You probably have the Westlands Growers totally booked, but I wanted to suggest that you might consider bringing them to this breakfast on Wednesday. It is not directly related to the trip, but I thought they might enjoy it between 8-9. Don't feel obligated to change their schedule. I thought it might be interesting.

No Images? [Click here](#)



Join Brownstein Hyatt Farber Schreck for a sneak peek into what to expect at the polls on November 8th!

[Barry Jackson](#) and [Senator Mark Begich](#) moderate a breakfast panel with the nation's leading public opinion researchers and communication strategists for a lively and critical conversation on polling and a forecast into the final weeks of the 2016 election.

Mark your calendar now!

Wednesday, September 14, 2016

8 am – 9 am

registration begins at 7:30 am

Charlie Palmer Steak

101 Constitution Ave NW

Washington, DC 20001

[Yes, I'll Attend](#)

[No, I Am Unable to Attend](#)

Panelists



Celinda Lake is one of the Democratic Party's leading political strategists, serving as tactician and senior advisor to the national party committees, dozens of Democratic incumbents, and challengers at all levels of the electoral process. Celinda and her firm are known for cutting-edge research on issues including the economy, health care, the environment and education, and have worked for a number of institutions including the Democratic National Committee (DNC), the Democratic Governor's Association (DGA), AFL-CIO, SEIU, CWA, IAFF, Sierra Club, NARAL, Human Rights Campaign, Planned Parenthood, The Next Generation, EMILY's List, VoteVets Action Fund, and the Kaiser Family Foundation.



Mark Mellman, one of the nation's leading public opinion researchers and communication strategists, is President of the American Association of Political Consultants and CEO of The Mellman Group, a polling and consulting firm whose clients include leading political figures, Fortune 500 companies, and some of the nation's most important public interest groups. Mellman, who counts among his clients Senate Democratic Leader Harry Reid and House Whip Steny Hoyer, has helped guide the campaigns of twenty-nine U.S. Senators, ten Governors, over two dozen Members of Congress, and numerous state and local officials.



David Winston is the president of The Winston Group, a Washington, D.C., a strategic planning and survey research firm. Winston has served as a strategic advisor to Senate and House Republican leadership for the past 10 years. He was formerly the Director of Planning for Speaker of the House Newt Gingrich, and advises center-right political parties throughout Europe. Additionally Winston was a senior fellow at the Heritage Foundation where he did statistical policy analysis and econometric modeling. In the private sector, he has advised Fortune 100 companies on strategic planning and brand reputation.



Myra Miller is Senior Vice President and Co-Founder of the Winston Group, a strategic planning and survey research firm. Myra has worked with House and Senate Leadership and Conferences for over a decade on communications, strategic planning and policy issues. She was closely involved in helping develop the successful House leadership strategy and narrative for the 2010 elections. On behalf of the Congressional Institute, she has done research on women voters and has worked with Members of Congress on how to talk to women voters.



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Camille L. Fordy

Administrative Assistant

Brownstein Hyatt Farber Schreck, LLP

1155 F Street N.W., Suite 1200

Washington, DC 20004

202.747.0504 tel

cfordy@bhfs.com

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From: Jason Peltier

Sent: Friday, September 2, 2016 2:07 PM

To: Ara Azhderian; Frances Mizuno; Jon Rubin; Johnny Amaral; Gayle Holman; Michael Burns; Ed Manning; Carolyn Jensen; Dennis Cardoza; David Bernhardt; Mike Wade; Dan Keppen

CC: Mike Stearns; Tom Birmingham

Subject: Fwd: RESPONSE: Report from UC Davis a clarification

FYI

Begin forwarded message:

From: "Mark M. Borba" <[REDACTED]@[REDACTED]>
Date: September 2, 2016 at 9:51:11 AM PDT
To: "dasumner@ucdavis.edu" <dasumner@ucdavis.edu>, Jonathan Barker <jbarker@ucdavis.edu>, howitt <howitt@primal.ucdavis.edu>, "rrengel@ucdavis.edu" <rrengel@ucdavis.edu>
Cc: "dan@primal.ucdavis.edu" <dan@primal.ucdavis.edu>, "rrengel@ucdavis.edu" <rrengel@ucdavis.edu>, "John Harris ([REDACTED]@[REDACTED]> <[REDACTED]@[REDACTED]>
" [REDACTED]@[REDACTED]> <[REDACTED]@[REDACTED]> " [REDACTED]@[REDACTED]> <[REDACTED]@[REDACTED]>
<[REDACTED]@[REDACTED]> "Bardin Bengard ([REDACTED]@[REDACTED]> <[REDACTED]@[REDACTED]> "John Diener - Red Rock Ranch, Inc. ([REDACTED]@[REDACTED]> <[REDACTED]@[REDACTED]> "Paul NEW Fleming ([REDACTED]@[REDACTED]> <[REDACTED]@[REDACTED]> Derek Borba <[REDACTED]@[REDACTED]>
<[REDACTED]@[REDACTED]> "Roger Isom ([REDACTED]@[REDACTED]> <[REDACTED]@[REDACTED]> "Mike Machado ([REDACTED]@[REDACTED]> <[REDACTED]@[REDACTED]>
<[REDACTED]@[REDACTED]> " [REDACTED]@[REDACTED]> <[REDACTED]@[REDACTED]> "Leon Garoyan ([REDACTED]@[REDACTED]> <[REDACTED]@[REDACTED]> "warren@primal.ucdavis.edu" <warren@primal.ucdavis.edu>, Mike Wade <mwade@farmwater.org>, "Cannon Michael (cannon@bfarm.com)" <cannon@bfarm.com>, Derek Borba <[REDACTED]@[REDACTED]> "Steve Patricio ([REDACTED]@[REDACTED]> <[REDACTED]@[REDACTED]>
Subject: RESPONSE: Report from UC Davis a clarification

Thanks for your response, Dan...but it's hard to put lipstick on a pig.

<https://californiawaterblog.com/2016/08/15/economic-analysis-of-the-2016-california-drought-for-agriculture/>

UCD failed miserably to accurately and adequately describe the economic impacts of the **"natural and regulatory drought"** that has our California ag economy held hostage again in 2016.

UC Davis puts out a report titled **"Economic Analysis of the 2016 California Drought for Agriculture"** and states **"about 78,800 acres of land could be idled due to drought"**? Really? Do you all live in an academic bubble?

And, what about such other absurdities in your report as:

-- **"No significant drought related impacts are expected for livestock and dairies this year", and**
-- **"Net water shortages will cost about \$247 million dollars in forgone gross crop revenues", plus**

-- \$303 million in additional pumping costs for a total of \$550 million in direct costs."

In 2016 on the Westside of the San Joaquin Valley...**over 250,000 acres were fallowed in the Westlands Water District, alone.** Now I don't have a PhD. in agricultural economics, but I did manage a BS back in the mid-1970's, and Dr. Leon Garoyan and Dr. Warren Johnston managed to adequately explain the multiplier effect that agricultural activity has on our rural towns, cities and the State's population. The multiplier I still recall is about "3.5 to 1".

FYI...the average farm-gate revenue on the typical farm (including mine) in Westlands is in excess of \$3,000/acre. With over 250,000 acres idled in 2016...that equates to about \$750,000,000 at the farm-gate. With a 3.5 X 1 multiplier...my UCD math background tells me there was a net economic impact (from only the WWD idled lands) of about **\$2.6 BILLION**....not the paltry \$603 million stated in your report! ***("Region-wide effects which include sectors supporting agriculture face gross revenue losses and households lost income of an estimated \$603 million and 4,700 jobs statewide.")***

I trust you get the point. UCD and its economist continue to understate (either intentionally or thru incompetence) the horrible economic impacts that this "natural and regulatory drought" are having on our State. With the leading statement in your report, ***"The drought continues for California's agriculture in 2016, but with much less severe and widespread impacts than in the two previous drought years, 2014 and 2015"***... readers are led to believe that things are better, and that the economic impacts are almost insignificant. That is misleading and a shame!

You stated in your email response to our criticism of the report: ***"The main take away for me is that much of the rest of the idled land is because of long standing regulatory issue that do not allow water to be delivered even in an almost normal year. That is an important point that would be hidden if we mistakenly said that the land idled this year was because of the 2016 drought."***

DAN—If you want to accurately describe the economic impacts of the drought, you cannot separate physical water adequacy from the multitude of regulatory restrictions that impact the management of the supply. Importantly, it matters not whether the shortage is due to physical supply constraints or arbitrary interpretations of regulations: **DEAD IS DEAD!** It is more accurate to describe the entire drought and its impacts...rather than **"hide"** the most significant factor of the regulatory issues, that is if quantification and understanding is the goal?

DAN-- You also stated, *"The attached few pages make this more clearly explicit that it evidently was in the original. It is not new information, but it is stated more clearly here. We will try to circulate this widely so that any misinterpretations of the original report are clear up, but we do not control what reporters print."* First, there were not additional attached pages to the email (I'd appreciate receiving them), but more importantly...and unfortunately, I doubt that your efforts at "clarification" will be productive. The earlier report has been absorbed and is now "fact":

- the ongoing drought's impacts are not that severe, and
- the economic ripple effects in 2016 are "only" \$603 million (note the \$2.6 BILLION in Westlands, alone)

While I appreciate the recognition to "clarify", who will read the "update"? It's like attempting to stuff the genie back in the bottle.

In the future I hope that UCD recognizes that when it puts the UC moniker on a "report", it has a responsibility and that it will have great impact. Our industry has had this report quoted in many news commentaries (including mine with CNBC, which triggered this exchange), as well as in the halls of Sacramento and Washington, always with the conclusion having been reached that the drought problem isn't as severe as often stated, and that it virtually has almost gone away.

It's impossible to un-ring a bell. The same is true of the inaccurate/mistakenly written report. Let's hope UCD gets it right...the 1st time...in the future.

Mark Borba
Borba Farms

[REDACTED]
Riverdale, CA 93656

559-866-5671 (o)
559-866-5666 (f)
559-[REDACTED] (m)
[REDACTED]

-----Original Message-----

From: Daniel A. Sumner [<mailto:dasumner@ucdavis.edu>]

Sent: Thursday, September 01, 2016 5:45 PM

To: Mark M. Borba; Jonathan Barker; howitt

Cc: dan@primal.ucdavis.edu; rrengel@ucdavis.edu; John Harris

([REDACTED]@ [REDACTED] [REDACTED] [REDACTED]@ [REDACTED] [REDACTED] [REDACTED]@ [REDACTED] [REDACTED]
Bardin Bengard ([REDACTED]@ [REDACTED] [REDACTED] John Diener - Red Rock Ranch, Inc.
([REDACTED]@ [REDACTED] [REDACTED] Paul NEW Fleming ([REDACTED]@ [REDACTED] [REDACTED] Derek
Borba; Roger Isom (roger@agprocessors.org); [REDACTED]@ [REDACTED] [REDACTED] Mike
Machado ([REDACTED] [REDACTED]@ [REDACTED] [REDACTED] [REDACTED]@ [REDACTED] [REDACTED] Leon Garoyan
([REDACTED]@ [REDACTED] [REDACTED] warren@primal.ucdavis.edu; Mike Wade; Cannon Michael
(cannon@bfarm.com)

Subject: Report from UC Davis a clarification

Mark, John, Rich, Chuck and all:

I hope you find the attached supplement to our August 15 report useful.

The main point is that the observations that there is a lot more than 77,000 acres of crop land idled this summer is full consistent with our finding of only that amount of idling due to the 2016 drought.

The main take away for me is that much of the rest of the idled land is because of long standing regulatory issue that do not allow water to be delivered even in an almost normal year. That is an important point that would be hidden if we mistakenly said that the land idled this year was because of the 2016 drought.

The attached few pages make this more clearly explicit that it evidently was in the original. It is not new information, but it is stated more clearly here.

We will try to circulate this widely so that any misinterpretations of the original report are clear up, but we do not control what reporters print.
Your help would be appreciated.

Dan

> MORE ACADEMIC 1/2 TRUTHS FROM UC DAVIS:

>

> The main problem with the report is that it only tells half (or less)
> of the story.

>

> By definition it's a drought report and the idled acres are defined as
> "Drought-related-idle acres." It doesn't begin to take into account
> the number of acres idled due to water supply cuts as a result of
> federal environmental regulations. On the Westside of the Valley that
> accounted for in excess of

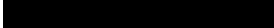
> 200,000 acres being idled in 2016 in the Westlands Water District, alone!
> <http://www.fresnobee.com/news/...<http://www.fresnobee.com/news/state/california/water-and-drought/article69443782.html>>
>
> In addition, the water transfers referenced in the article provided
> minimal benefit to offset the economic cost of 2014 and 2015, because
> the transfers were not confirmed or accounted for by Reclamation until
> long after the irrigation season ended. And in 2016, Reclamation
> appropriated the transfer water for their own use.
>
> "Garbage in; Garbage out!"
>
> Mark Borba
> Borba Farms
> [REDACTED]
> Riverdale, CA 93656
>
> 559-866-5671 (o)
> 559-866-5666 (f)
> 559-[REDACTED] (m)
> [REDACTED]
>
> From: Daniels, Jeff (NBCUniversal) [mailto:[REDACTED].[REDACTED]@[REDACTED].[REDACTED]]
> Sent: Monday, August 15, 2016 11:20 AM
> To: Mark M. Borba
> Subject: here's report from UC Davis
>
> 2016 UC Davis report out today:
> <https://californiawaterblog.com/2016/08/15/economic-analysis-of-the-2016-california-drought-for-agriculture/>
>
> 2015 report showing 540,000 fallowed acreage:
> https://watershed.ucdavis.edu/files/biblio/Economic_Analysis_2015_California_Drought_Executive_Summary.pdf
>
>




--

Daniel A. Sumner, Director, University of California Agricultural Issues Center and
Frank H. Buck, Jr. Professor, Department of Agricultural and Resource Economics,
University of California, Davis

Mail: One Shields Avenue, Davis, CA 95616 AIC Campus Office: 260 Hunt Hall
530-752-1668 www.aic.ucdavis.edu

Mark Borba
Borba Farms


Riverdale, CA 93656

559-866-5671 (o)
559-866-5666 (f)
559-- (m)


From: Gayle Holman

Sent: Friday, September 2, 2016 2:20 PM

To: 'Jason Peltier'; 'Ara Azhderian'; 'Frances Mizuno'; 'Jon Rubin'; 'Johnny Amaral'; 'Michael Burns'; 'Ed Manning'; 'Carolyn Jensen'; 'Dennis Cardoza'; 'David Bernhardt'; 'Mike Wade'; 'Dan Keppen'

CC: 'Mike Stearns'; 'Tom Birmingham'

Subject: RE: RESPONSE: Report from UC Davis a clarification

Thanks Jason. I already responded to Mark this morning and shared our recent joint press release dated August 16th (<http://wwd.ca.gov/wp-content/uploads/2016/08/JtPressRelease.20160816.pdf>) with SLDMWA.

Gayle

Gayle Holman
Public Affairs Representative
Westlands Water District
3130 N. Fresno Street
P.O. Box 6056
Fresno, CA 93703-6056
(559) 241-6233 (direct)
(559) [REDACTED] (cell)
(559) 241-6277 (fax)
gholman@westlandswater.org

From: Jason Peltier [mailto:jason.peltier@sldmwa.org]

Sent: Friday, September 2, 2016 2:07 PM

To: Ara Azhderian; Frances Mizuno; Jon Rubin; Johnny Amaral; Gayle Holman; Michael Burns; Ed Manning; Carolyn Jensen; Dennis Cardoza; David Bernhardt; Mike Wade; Dan Keppen

Cc: Mike Stearns; Tom Birmingham

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Cc: "dan@primal.ucdavis.edu" <dan@primal.ucdavis.edu>, "rrengel@ucdavis.edu" <rrengel@ucdavis.edu>, John Harris <[REDACTED]@[REDACTED]>, [REDACTED] <[REDACTED]@[REDACTED]>, [REDACTED] <[REDACTED]@[REDACTED]>, [REDACTED] <[REDACTED]@[REDACTED]>, "Bardin Bengard" <[REDACTED]@[REDACTED]>, [REDACTED] <[REDACTED]@[REDACTED]>, "John Diener - Red Rock Ranch, Inc." <[REDACTED]@[REDACTED]>, [REDACTED] <[REDACTED]@[REDACTED]>, "Paul NEW Fleming" <[REDACTED]@[REDACTED]>, [REDACTED] <[REDACTED]@[REDACTED]>, Derek Borba <[REDACTED]@[REDACTED]>, "Roger Isom" <[REDACTED]@[REDACTED]>, [REDACTED] <[REDACTED]@[REDACTED]>, [REDACTED] <[REDACTED]@[REDACTED]>, "Mike Machado" <[REDACTED]@[REDACTED]>, [REDACTED] <[REDACTED]@[REDACTED]>, [REDACTED] <[REDACTED]@[REDACTED]>, "Leon Garoyan" <[REDACTED]@[REDACTED]>, [REDACTED] <[REDACTED]@[REDACTED]>, "warren@primal.ucdavis.edu" <warren@primal.ucdavis.edu>, Mike Wade <mwade@farmwater.org>, "Cannon Michael" <cannon@bfarm.com>, "cannon@bfarm.com" <cannon@bfarm.com>, Derek Borba <[REDACTED]@[REDACTED]>, "Steve Patricio" <[REDACTED]@[REDACTED]>

(b) (6) @ (b) (6) < (b) (6) @ (b) (6) (b) (6)

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You stated in your email response to our criticism of the report: ***"The main take away for me is that much of the rest of the idled land is because of long standing regulatory issue that do not allow water to be delivered even in an almost normal year. That is an important point that would be hidden if we mistakenly said that the land idled this year was because of the 2016 drought."***

DAN—If you want to accurately describe the economic impacts of the drought, you cannot separate physical water adequacy from the multitude of regulatory restrictions that impact the management of the supply. Importantly, it matters not whether the shortage is due to physical supply constraints or arbitrary interpretations of regulations: **DEAD IS DEAD!** It is more accurate to describe the entire drought and its impacts...rather than "hide" the most significant factor of the regulatory issues, that is if quantification and understanding is the goal?

DAN-- You also stated, ***"The attached few pages make this more clearly explicit that it evidently was in the original. It is not new information, but it is stated more clearly here. We will try to circulate this widely so that any misinterpretations of the original report are clear up, but we do not control what reporters print."*** First, there were not additional attached pages to the email (I'd appreciate receiving them), but more importantly...and unfortunately, I doubt that your efforts at "clarification" will be productive. **The earlier report has been absorbed and is now "fact":**

- the ongoing drought's impacts are not that severe, and
- the economic ripple effects in 2016 are "only" \$603 million (note the \$2.6 BILLION in Westlands, alone)

While I appreciate the recognition to "clarify", who will read the "update"? It's like attempting to stuff the genie back in the bottle.

In the future I hope that UCD recognizes that when it puts the UC moniker on a "report", it has a responsibility and that it will have great impact. Our industry has had this report quoted in many news commentaries (including mine with CNBC, which triggered this exchange), as well as in the halls of Sacramento and Washington, always with the conclusion having been reached that **the drought problem isn't as severe as often stated, and that it virtually has almost gone away.**

It's impossible to un-ring a bell. The same is true of the inaccurate/mistakenly written report. Let's hope UCD gets it right...the 1st time...in the future.

Mark Borba
Borba Farms

[REDACTED]
Riverdale, CA 93656

559-866-5671 (o)

559-866-5666 (f)

559-[REDACTED] (m)

[REDACTED]@ [REDACTED]. [REDACTED]

-----Original Message-----

From: Daniel A. Sumner [<mailto:dasumner@ucdavis.edu>]

Sent: Thursday, September 01, 2016 5:45 PM

To: Mark M. Borba; Jonathan Barker; howitt

Cc: dan@primal.ucdavis.edu; rrengel@ucdavis.edu; John Harris

([\[REDACTED\]@ \[REDACTED\]. \[REDACTED\]](mailto:[REDACTED]@ [REDACTED]. [REDACTED]) chuck@nicholsfarms.com; [\[REDACTED\]@ \[REDACTED\]. \[REDACTED\]](mailto:[REDACTED]@ [REDACTED]. [REDACTED])

Bardin Bengard ([\[REDACTED\]@ \[REDACTED\]. \[REDACTED\]](mailto:[REDACTED]@ [REDACTED]. [REDACTED]) John Diener - Red Rock Ranch, Inc.

([\[REDACTED\]@ \[REDACTED\]. \[REDACTED\]](mailto:[REDACTED]@ [REDACTED]. [REDACTED]) Paul NEW Fleming ([\[REDACTED\]@ \[REDACTED\]. \[REDACTED\]](mailto:[REDACTED]@ [REDACTED]. [REDACTED]) Derek

Borba; Roger Isom ([\[REDACTED\]@ \[REDACTED\]. \[REDACTED\]](mailto:[REDACTED]@ [REDACTED]. [REDACTED]) [\[REDACTED\]@ \[REDACTED\]. \[REDACTED\]](mailto:[REDACTED]@ [REDACTED]. [REDACTED]) Mike

Machado ([\[REDACTED\]. \[REDACTED\]@ \[REDACTED\]. \[REDACTED\]](mailto:[REDACTED]. [REDACTED]@ [REDACTED]. [REDACTED]) [\[REDACTED\]@ \[REDACTED\]. \[REDACTED\]](mailto:[REDACTED]@ [REDACTED]. [REDACTED]) Leon Garoyan

([\[REDACTED\]@ \[REDACTED\]. \[REDACTED\]](mailto:[REDACTED]@ [REDACTED]. [REDACTED]) warren@primal.ucdavis.edu; Mike Wade; Cannon Michael

(cannon@bfarm.com)

Subject: Report from UC Davis a clarification

Mark, John, Rich, Chuck and all:

I hope you find the attached supplement to our August 15 report useful.

The main point is that the observations that there is a lot more than 77,000 acres of crop land idled this summer is full consistent with our finding of only that amount of idling due to the 2016 drought.

The main take away for me is that much of the rest of the idled land is because of long standing regulatory issue that do not allow water to be delivered even in an almost normal year. That is an important point that would be hidden if we mistakenly said that the land idled this year was because of the 2016 drought.

The attached few pages make this more clearly explicit that it evidently was in the original. It is not new information, but it is stated more clearly here.

We will try to circulate this widely so that any misinterpretations of the original report are clear up, but we do not control what reporters print.
Your help would be appreciated.

Dan

> MORE ACADEMIC 1/2 TRUTHS FROM UC DAVIS:

>

> The main problem with the report is that it only tells half (or less)
> of the story.

>

> By definition it's a drought report and the idled acres are defined as
> "Drought-related-idle acres." It doesn't begin to take into account
> the number of acres idled due to water supply cuts as a result of
> federal environmental regulations. On the Westside of the Valley that
> accounted for in excess of
> 200,000 acres being idled in 2016 in the Westlands Water District, alone!
> <http://www.fresnobee.com/news/...<http://www.fresnobee.com/news/state/california/water-and-drought/article69443782.html>

>

> In addition, the water transfers referenced in the article provided
> minimal benefit to offset the economic cost of 2014 and 2015, because
> the transfers were not confirmed or accounted for by Reclamation until
> long after the irrigation season ended. And in 2016, Reclamation
> appropriated the transfer water for their own use.

>

> "Garbage in; Garbage out"!

>

> Mark Borba
> Borba Farms

>

> Riverdale, CA 93656

>

> 559-866-5671 (o)

> 559-866-5666 (f)

> 559- [REDACTED] (m)

>

>

> From: Daniels, Jeff (NBCUniversal) [mailto:jeff.daniels@nbcuni.com]
> Sent: Monday, August 15, 2016 11:20 AM
> To: Mark M. Borba
> Subject: here's report from UC Davis
>
> 2016 UC Davis report out today:
> <https://californiawaterblog.com/2016/08/15/economic-analysis-of-the-2016-california-drought-for-agriculture/>
>
> 2015 report showing 540,000 fallowed acreage:
> https://watershed.ucdavis.edu/files/biblio/Economic_Analysis_2015_California_Drought_Executive_Summary.pdf
>
>

--

Daniel A. Sumner, Director, University of California Agricultural Issues Center and
Frank H. Buck, Jr. Professor, Department of Agricultural and Resource Economics,
University of California, Davis

Mail: One Shields Avenue, Davis, CA 95616 AIC Campus Office: 260 Hunt Hall
530-752-1668 www.aic.ucdavis.edu

*Mark Borba
Borba Farms*

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Riverdale, CA 93656

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559-866-5666 (f)
559-[REDACTED]-[REDACTED] (m)

[REDACTED]@[REDACTED].[REDACTED]

From: Cannon Michael

Sent: Sunday, September 4, 2016 4:25 PM

To: Johnny Amaral; Ara Azhderian

CC: Dennis A. Cardoza; jwalsh@foley.com; jthomas@foley.com; Joe Raeder; Nancy E Williams; David Longly Bernhardt; Sara Tucker; Mike Burns; Chase Hurley; Steve Chedester; Dan Vink; Dave Orth; Jason R. Phillips; Todd Neves; Carl Janzen; Kent Stephens; Daniel Errotabere; Tom Teixeira; Greg Wegis; James Costa Sr.; Daniel Bays

Subject: DC Trip - Dinners

Hope you all are enjoying the weekend.

I wanted to see about coordination on dinners while we are in DC.

I know some arrive on the 12th and some on the 13th.

For those on the 12th, I have a reservation at Carmine's at 7:30 for those interested in meeting there - I currently have the reservation for 12 but can increase if needed. Please let me know if you are interested.

The 13th is currently open right now, but we are working on it and will let you know shortly.

The 14th is set for Jim Costa - he is getting the details worked out and I hope we can have the entire group present.

A lot of us are leaving on the 15th, so I have not planned anything for that night.

Please let me know about the 12th, I will keep you posted about the 13th and please plan to keep the 14th open for the dinner with Jim.

We have a great group on the trip and I look forward to spending time with all of you.

Sincerely,

Cannon Michael

Bowles Farming Company
209-752-7792 (Direct)
www.bfarm.com
@agleader

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=====

From: DCardoza@foley.com
Sent: Sunday, September 4, 2016 5:17 PM
To: Cannon Michael; Amaral Johnny; Bernhardt David Longly; Williams Nancy; Raeder Joseph L.
Subject: Re: DC Trip - Dinners

Hi Cannon,

As you may have heard, I had an unplanned Knee replacement surgery last Thursday. It went quite well, so far, but crawling the hill will have to be left to others in my shop and our other colleagues listed here. I do believe I should be able to make one or two dinners based on current progress and would love to see everyone from home.

Sent from my iPhone

Please excuse any auto correct errors

On Sep 4, 2016, at 7:25 PM, Cannon Michael <cannon@bfarm.com<<mailto:cannon@bfarm.com>>> wrote:

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www.bfarm.com<https://urldefense.proofpoint.com/v2/url?u=http-3A_www.bfarm.com&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t0O7w&m=A7Rae1g6e2OoXqcUSW75AYp10LYevmm1e1URMsmkb0A&s=pyS98FAtADw1tNLV7P3NDG0TUKS-9rHq127_unv2usY&e=>>
<https://urldefense.proofpoint.com/v2/url?u=https-3A_twitter.com_agleader&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t0O7w&m=A7Rae1g6e2OoXqcUSW75AYp10LYevmm1e1URMsmkb0A&s=nRqXBtpyssNjpCbj79bSvk25zVwUs3w3K17wk6PuLwU&e=>>

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From: DCardoza@foley.com

Sent: Sunday, September 4, 2016 5:20 PM

To: Cannon Michael; Amaral Johnny; Bernhardt David Longly; Williams Nancy; Raeder Joseph L.

Subject: Re: DC Trip - Dinners

Sorry in my drug induced state I hit send prematurely. ☺. Feel free to give me a call before you head out and let me know when you would like me at dinner.

Regards

Dennis

Sent from my iPhone

Please excuse any auto correct errors

On Sep 4, 2016, at 8:17 PM, Cardoza, Dennis A. <DCardoza@foley.com<<mailto:DCardoza@foley.com>>> wrote:

Hi Cannon,

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Sincerely,

Cannon Michael

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[3A_twitter.com_agleader&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t0O7w&m=A7Rae1g6e2OoXqcUSW75AYp10LYevmm1e1URMsmkb0A&s=nRqXBtpyssNjpCbj79bSvk25zVwUs3w3K17wk6PuLwU&e=>](https://urldefense.proofpoint.com/v2/url?u=https-3A%20twitter.com%20agleader&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t0O7w&m=A7Rae1g6e2OoXqcUSW75AYp10LYevmm1e1URMsmkb0A&s=nRqXBtpyssNjpCbj79bSvk25zVwUs3w3K17wk6PuLwU&e=>)

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From: Cannon Michael
Sent: Sunday, September 4, 2016 5:46 PM
To: DCardoza@foley.com
CC: Amaral Johnny; Bernhardt David Longly; Williams Nancy; Raeder Joseph L.
Subject: Re: DC Trip - Dinners

Hopefully all of them! Always good to have you. The more the better I always feel. Glad you are recovering.

Sincerely,

Cannon Michael
Bowles Farming Company
209-769-6777

> On Sep 4, 2016, at 5:19 PM, "DCardoza@foley.com" <DCardoza@foley.com> wrote:

>

> Sorry in my drug induced state I hit send prematurely. ☺. Feel free to give me a call before you head out and let me know when you would like me at dinner.

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> Sent from my iPhone

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> Please excuse any auto correct errors

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> Cannon Michael
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> 209-752-7792 (Direct)

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From: Bernhardt, David L.
Sent: Monday, September 5, 2016 12:36 PM
To: pwilliams@westlandswater.org
Subject: Meeting

Phil: I wanted to check in and see how you are doing. I hope you are doing well. If you are back in the saddle, I'm actually going to be in Sacramento tomorrow and Wednesday. I wanted to see if you might be up for getting together for dinner on Tuesday or grabbing lunch on Wednesday.

If you're not up for much yet, I completely understand.

Best,
David

David Bernhardt

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From: Philip Williams
Sent: Monday, September 5, 2016 12:44 PM
To: Bernhardt, David L.
Subject: Re: Meeting

Thank you for checking in, David; I'm feeling very well and appreciate your support the past week.

I would love to join you for either dinner tomorrow or lunch Wednesday; just let me know which would be better for you. I look forward to seeing you again.

V/r,
Phil

Philip A. Williams
Deputy General Counsel
Westlands Water District
Office: 916-321-4207
Cell: 931-████-████

(Sent from my iPhone)

On Sep 5, 2016, at 12:36 PM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

Phil: I wanted to check in and see how you are doing. I hope you are doing well. If you are back in the saddle, I'm actually going to be in Sacramento tomorrow and Wednesday. I wanted to see if you might be up for getting together for dinner on Tuesday or grabbing lunch on Wednesday.

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From: Bernhardt, David L.
Sent: Monday, September 5, 2016 1:10 PM
To: Philip Williams
Subject: Re: Meeting

Phil: That's fantastic news. I'm glad you're doing well. Let's shoot for lunch on Wednesday, unless it would be easier for you to do dinner in Wednesday, which would also work.

Best

David Bernhardt

On Sep 5, 2016, at 3:44 PM, Philip Williams <pwilliams@westlandswater.org> wrote:

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V/r,
Phil

Philip A. Williams
Deputy General Counsel
Westlands Water District
Office: 916-321-4207
Cell: 931-████-████

(Sent from my iPhone)

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David Bernhardt

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From: Cannon Michael

Sent: Tuesday, September 6, 2016 8:37 AM

To: Ara Azhderian; Johnny Amaral

CC: Carl Janzen; Chase Hurley; Dan Vink; Daniel Bays; Daniel Errotabere; Dave Orth; David Longly Bernhardt; Dennis A. Cardoza; Greg Wegis; James Costa Sr.; Jason R. Phillips; Joe Raeder; Kent Stephens; Mike Burns; Nancy E Williams; Sara Tucker; Steve Chedester; Todd Neves; Tom Teixeira; jthomas@foley.com; jwalsh@foley.com

Subject: Re: DC Trip - Dinners

Dinner on the 14th is confirmed with Jim Costa.

Tadich Grill for Wed. Sept. 14 at 7:30pm.

1001 Pennsylvania Avenue NW, Washington, DC 20004.

On Sun, Sep 4, 2016 at 4:25 PM Cannon Michael <cannon@bfarm.com> wrote:

Hope you all are enjoying the weekend.

I wanted to see about coordination on dinners while we are in DC.

I know some arrive on the 12th and some on the 13th.

For those on the 12th, I have a reservation at Carmine's at 7:30 for those interested in meeting there - I currently have the reservation for 12 but can increase if needed. Please let me know if you are interested.

The 13th is currently open right now, but we are working on it and will let you know shortly.

The 14th is set for Jim Costa - he is getting the details worked out and I hope we can have the entire group present.

A lot of us are leaving on the 15th, so I have not planned anything for that night.

Please let me know about the 12th, I will keep you posted about the 13th and please plan to keep the 14th open for the dinner with Jim.

We have a great group on the trip and I look forward to spending time with all of you.

Sincerely,

Cannon Michael
Bowles Farming Company
209-752-7792 (Direct)
www.bfarm.com
@agleader

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=====

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=====

--

Sincerely,

Cannon Michael

From: Philip Williams
Sent: Tuesday, September 6, 2016 8:53 AM
To: 'Bernhardt, David L.'
Subject: RE: Meeting

David,

Lunch Wednesday sounds great. Where will you be; I'm happy to come close to you.

v/r,
Phil

From: Bernhardt, David L. [mailto:DBernhardt@BHFS.com]
Sent: Monday, September 5, 2016 1:10 PM
To: Philip Williams
Subject: Re: Meeting

Phil: That's fantastic news. I'm glad you're doing well. Let's shoot for lunch on Wednesday, unless it would be easier for you to do dinner in Wednesday, which would also work.

Best

David Bernhardt

On Sep 5, 2016, at 3:44 PM, Philip Williams <pwilliams@westlandswater.org> wrote:

Thank you for checking in, David; I'm feeling very well and appreciate your support the past week.

I would love to join you for either dinner tomorrow or lunch Wednesday; just let me know which would be better for you. I look forward to seeing you again.

V/r,
Phil

Philip A. Williams
Deputy General Counsel
Westlands Water District
Office: 916-321-4207
Cell: 931-████-████

(Sent from my iPhone)

On Sep 5, 2016, at 12:36 PM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

Phil: I wanted to check in and see how you are doing. I hope you are doing well. If you are back in the saddle, I'm actually going to be in Sacramento tomorrow and Wednesday. I wanted to see if you might be up for getting together for dinner on Tuesday or grabbing lunch on Wednesday.

If you're not up for much yet, I completely understand.

Best,
David

David Bernhardt

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From: Bernhardt, David L.
Sent: Wednesday, September 7, 2016 6:54 AM
To: Philip Williams
Subject: Re: Meeting

Phil: I thought we could meet at the restaurant in the Well Fargo building where your office is located, unless you would prefer to go somewhere in old Sacramento.

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From: Philip Williams
Sent: Wednesday, September 7, 2016 8:11 AM
To: Bernhardt, David L.
Subject: Re: Meeting

That sounds great 'David. Thank you for making the time. I'll see you at noon at Il Fornaio.

Philip A. Williams
Deputy General Counsel
Westlands Water District
Office: 916-321-4207
Cell: 931-████-████

(Sent from my iPhone)

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From: Cannon Michael

Sent: Thursday, September 8, 2016 1:05 PM

To: Johnny Amaral; Ara Azhderian

CC: Dennis A. Cardoza; Jennifer Walsh; jthomas@foley.com; Joe Raeder; Nancy E Williams; David Longly Bernhardt; Sara Tucker; Mike Burns; Chase Hurley; Steve Chedester; Dan Vink; Dave Orth; Jason R. Phillips; Todd Neves; Carl Janzen; Kent Stephens; Daniel Errotabere; Kimberly Brown; Tom Teixeira; Greg Wegis; James Costa Sr.; Daniel Bays

Subject: Re: DC Call - Thursday (tomorrow)

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You are welcome to still use the conference line if you wish, but with the current schedule we should be ok as far as the plan goes.

I will send an email to check in soon.

Thank you and sorry again for missing the call today.

Sincerely,

Cannon Michael
Bowles Farming Company
209-752-7792 (Direct)
www.bfarm.com
[@agleader](#)

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I will send out an invite shortly for the call.

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PIN: █████

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=====

From: JWalsh@foley.com
Sent: Thursday, September 8, 2016 1:08 PM
To: 'Johnny Amaral'
Subject: FW: DC Call - Thursday (tomorrow)

Johnny-

What are your thoughts on scheduling staff for the MOCs who aren't able to meet in person but have offered staff, ie McNerney, Linda Sanchez etc. Should we move out on those since we are only missing McCarthy right now? Or do you want to skip staff all together? I was going to raise on call but looks like it's off.

Jen

Jennifer F. Walsh
Director of Public Affairs
Foley & Lardner LLP
3000 K Street, N.W., Suite 600
Washington, DC 20007-5109
(202) 295-4762

From: Cannon Michael [mailto:cannon@bfarm.com]
Sent: Thursday, September 08, 2016 4:05 PM
To: Johnny Amaral; Ara Azhderian
Cc: Cardoza, Dennis A.; Walsh, Jennifer F.; Thomas Jr, John B.; Joe Raeder; Nancy E Williams; David Longly Bernhardt; Sara Tucker; Mike Burns; Chase Hurley; Steve Chedester; Dan Vink; Dave Orth; Jason R. Phillips; Todd Neves; Carl Janzen; Kent Stephens; Daniel Errotabere; Kimberly Brown; Tom Teixeira; Greg Wegis; James Costa Sr.; Daniel Bays
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[@agleader](http://www.bfarm.com)

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PIN: [REDACTED]

Sincerely,

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From: Johnny Amaral
Sent: Thursday, September 8, 2016 1:10 PM
To: JWalsh@foley.com
Subject: Re: DC Call - Thursday (tomorrow)

Can you talk? 559-■■■■-■■■■

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

On Sep 8, 2016, at 1:07 PM, "JWalsh@foley.com" <JWalsh@foley.com> wrote:

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From: Johnny Amaral

Sent: Thursday, September 8, 2016 1:23 PM

To: 'Cannon Michael'; 'Ara Azhderian'

CC: 'Dennis A. Cardoza'; 'Jennifer Walsh'; jthomas@foley.com; 'Joe Raeder'; 'Nancy E Williams'; 'David Longly Bernhardt'; 'Sara Tucker'; 'Mike Burns'; 'Chase Hurley'; 'Steve Chedester'; 'Dan Vink'; 'Dave Orth'; 'Jason R. Phillips'; 'Todd Neves'; 'Carl Janzen'; 'Kent Stephens'; 'Daniel Errotabere'; 'Kimberly Brown'; 'Tom Teixeira'; 'Greg Wegis'; 'James Costa Sr.'; 'Daniel Bays'

Subject: RE: DC Call - Thursday (tomorrow)

Lets push the call off for now. The team in DC will be sending around a revised itinerary tomorrow for all to review. And we have a breakfast meeting scheduled for next Tuesday, BEFORE our first meeting of the week, to go over any last minute issues that need to be discussed. Sound ok to the group?

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From: Greg Wegis

Sent: Thursday, September 8, 2016 1:25 PM

To: Johnny Amaral

CC: Cannon Michael; Ara Azhderian; Dennis A. Cardoza; Jennifer Walsh; jthomas@foley.com; Joe Raeder; Nancy E Williams; David Longly Bernhardt; Sara Tucker; Mike Burns; Chase Hurley; Steve Chedester; Dan Vink; Dave Orth; Jason R. Phillips; Todd Neves; Carl Janzen; Kent Stephens; Daniel Errotabere; Kim Brown; Tom Teixeira; James Costa Sr.; Daniel Bays

Subject: Re: DC Call - Thursday (tomorrow)

Sounds good to me.

Greg Wegis

Wegis and Young

Partner

34929 Flyover Ct

Bakersfield Ca

93308

661-■■■■-■■■■

greg@wegisandyoung.com

On Sep 8, 2016, at 1:22 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

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PIN: 877-8777

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=====

From: Joe Raeder

Sent: Thursday, September 8, 2016 1:26 PM

To: Johnny Amaral; 'Cannon Michael'; 'Ara Azhderian'

CC: 'Dennis A. Cardoza'; 'Jennifer Walsh'; jthomas@foley.com; Joe Raeder; 'Nancy E Williams'; 'David Longly Bernhardt'; 'Sara Tucker'; 'Mike Burns'; 'Chase Hurley'; 'Steve Chedester'; 'Dan Vink'; 'Dave Orth'; 'Jason R. Phillips'; 'Todd Neves'; 'Carl Janzen'; 'Kent Stephens'; 'Daniel Errotabere'; 'Kimberly Brown'; 'Tom Teixeira'; 'Greg Wegis'; 'James Costa Sr.'; 'Daniel Bays'

Subject: RE: DC Call - Thursday (tomorrow)

Agree

Joe Raeder

----- Original message -----

From: Johnny Amaral <jamaral@westlandswater.org>

Date: 9/8/16 4:22 PM (GMT-05:00)

To: 'Cannon Michael' <cannon@bfarm.com>, 'Ara Azhderian' <Ara.Azhderian@sldmwa.org>

Cc: "Dennis A. Cardoza" <dcardoza@foley.com>, 'Jennifer Walsh' <jwalsh@foley.com>, jthomas@foley.com, Joe Raeder <JRaeder@tfgnet.com>, 'Nancy E Williams' <nwilliams@swaconsult.com>, 'David Longly Bernhardt' <dbernhardt@bhfs.com>, 'Sara Tucker' <sara@naturalresourceresults.com>, 'Mike Burns' <mburns@ka-pow.com>, 'Chase Hurley' <chase@hmrdrd.net>, 'Steve Chedester' <schedester@sjrecwa.net>, 'Dan Vink' <dvink@svwater.org>, 'Dave Orth' <dorth@davidorthconsulting.com>, "Jason R. Phillips" <jphillips@friantwater.org>, 'Todd Neves' <tneves@westlandswater.org>, 'Carl Janzen' <cjanzen@madera-id.org>, 'Kent Stephens' <[REDACTED]@[REDACTED]>, 'Daniel Errotabere' <[REDACTED]@[REDACTED]>, 'Kimberly Brown' <Kimberly.Brown@wonderful.com>, 'Tom Teixeira' <[REDACTED]@[REDACTED]>, 'Greg Wegis' <Greg@wegisandyoung.com>, "James Costa Sr." <[REDACTED]@[REDACTED]>, 'Daniel Bays' <[REDACTED]@[REDACTED]>

Subject: RE: DC Call - Thursday (tomorrow)

Lets push the call off for now. The team in DC will be sending around a revised itinerary tomorrow for all to review. And we have a breakfast meeting scheduled for next Tuesday, BEFORE our first meeting of the week, to go over any last minute issues that need to be discussed. Sound ok to the group?

From: Cannon Michael [<mailto:cannon@bfarm.com>]

Sent: Thursday, September 8, 2016 1:05 PM

To: Johnny Amaral; Ara Azhderian

Cc: Dennis A. Cardoza; Jennifer Walsh; jthomas@foley.com; Joe Raeder; Nancy E Williams; David Longly Bernhardt; Sara Tucker; Mike Burns; Chase Hurley; Steve Chedester; Dan Vink; Dave Orth; Jason R. Phillips; Todd Neves; Carl Janzen; Kent Stephens; Daniel Erro

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You are welcome to still use the conference line if you wish, but with the current schedule we should be ok as far as the plan goes.

I will send an email to check in soon.

Thank you and sorry again for missing the call today.

Sincerely,

Cannon Michael

Bowles Farming Company

209-752-7792 (Direct)

www.bfarm.com<<http://www.bfarm.com>>

@agleader<<https://twitter.com/agleader>>

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=====

On Wed, Sep 7, 2016 at 9:28 PM, Cannon Michael <cannon@bfarm.com<<mailto:cannon@bfarm.com>>> wrote:
Hello all,

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I will send out an invite shortly for the call.

The info will be the same as the last call - 877-████-████ <tel:877-████-████>
PIN: █████

Sincerely,

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www.bfarm.com<<http://www.bfarm.com>>
[@agleader](https://twitter.com/agleader)<<https://twitter.com/agleader>>

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Spam<<https://antispam.roaringpenguin.com/canit/b.php?i=04RF8m1rk&m=f82bab459b71&t=20160908&c=s>>
Phish/Fraud<<https://antispam.roaringpenguin.com/canit/b.php?i=04RF8m1rk&m=f82bab459b71&t=20160908&c=p>>
Not spam<<https://antispam.roaringpenguin.com/canit/b.php?i=04RF8m1rk&m=f82bab459b71&t=20160908&c=n>>
Forget previous vote<<https://antispam.roaringpenguin.com/canit/b.php?i=04RF8m1rk&m=f82bab459b71&t=20160908&c=f>>

From: Ara Azhderian
Sent: Thursday, September 8, 2016 1:47 PM
To: Johnny Amaral
Subject: RE: DC Call - Thursday (tomorrow)

Bueno

Sent from my Verizon Wireless 4G LTE DROID

On Sep 8, 2016 1:22 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

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=====

From: Jason Peltier

Sent: Thursday, September 8, 2016 4:24 PM

To: Dennis Cardoza; David Bernhardt; JWalsh@foley.com; Johnny Amaral; Ed Manning; Ara Azhderian

Subject: FW: DRAFT Family Farm Alliance Policy Platform

Attachments: Policy Platform August 2016 v3 clean.docx

From: Dan Keppen [mailto:dankeppen@charter.net]

Sent: Thursday, September 8, 2016 10:31 AM

To: Bill Kennedy <[REDACTED]@[REDACTED]> 'Chris Hurd' <[REDACTED]@[REDACTED]>
[REDACTED]@[REDACTED] 'Don Schwindt' <[REDACTED]@[REDACTED]> 'Harold Mohlman' <hderian@sldmwa.org>;
'Shelley Ostrowski' <sostrowski@westlandswater.org>

Subject: DRAFT Family Farm Alliance Policy Platform

Dear Alliance Directors and Advisory Committee Members:

Attached is a draft, 2-page summary of key talking points we intend on conveying to the two presidential transition teams, and which will likely form the basis for over-arching messaging associated with upcoming visits to Washington, D.C. next week and at the end of the month. Please take a few minutes to review, and do not hesitate to let me know if you have any concerns, suggested edits, or additional points to be raised.

Thanks for your consideration of this matter.

Best regards –

Dan Keppen
Executive Director



Protecting Water for Western Irrigated Agriculture

P.O. Box 216 Klamath Falls, Oregon 97601
dankeppen@charter.net

The Family Farm Alliance Federal Water Policy Platform

The Family Farm Alliance believes society should reject federal water policies that lead to shuttering farming communities to meet burgeoning urban growth, increased recreational demands and environmental requirements. Our nation needs a stable, secure domestic food supply, just as it needs a stable, secure energy supply.

Now is the time for a consistent and thoughtful federal water policy that looks to meet all of the needs of the West and the nation. This platform can form the basis for that policy.

We believe water stakeholders in the West can find solutions to complex water conflicts that protect our Nation's ability to feed ourselves, export food to others, and continue to lead the world in agricultural production, all the while finding ways to accommodate the water supply needs of continued urban growth, recreational demands, and environmental requirements. Fair, balanced, and long lasting solutions will not come easily. They will require visionary leadership and a firm commitment to a sensible, workable policy.

Key Policy Recommendations

National Food Production Policy:

The United States should set an overriding national goal of protecting our self-sufficient food producing capabilities. Food security is homeland security. Policy decisions on a wide range of issues should then be evaluated to be sure they are consistent with that goal – especially water policy decisions where adequate irrigation water supplies are the key component of agricultural production.

States and local governments must consider the impacts of continued growth that relies on water transfers from agriculture and rural areas and to identify feasible alternatives to those transfers.

Water Laws and Water Rights:

State laws and institutions must be given deference in issues relating to water rights and water resource allocation, use, control and transfer. The best decisions on water issues happen at the state and local level. When water laws and environmental laws conflict, balanced solutions must be found that respect the socioeconomic realities of the West.

Federal Environmental Laws and Regulations:

The goals of the Endangered Species Act, the Clean Water Act, the National Environmental Policy Act (NEPA) and other federal environmental laws are laudable. However, these decades-old laws are in need of some targeted reforms, including common-sense changes to make them work better, encourage incentive-driven recovery efforts, and discourage litigation. The Alliance believes NEPA should be better coordinated and streamlined to remove any unnecessary regulatory barriers to completion of much-needed water resource infrastructure projects of the future. And, all exclusions and exemptions provided by the Clean Water Act for farming, ranching, and for irrigation ditches and drains must be protected and adhered to by the federal Environmental Protection Agency (EPA).

The negative impacts of today's droughts and water shortages have reached staggering levels for our farmers and ranchers, their families and the irrigated agricultural economy. Unfortunately,

these impacts are driven in part by current federal environmental regulations, triggered by fixed calendar dates or singular operational thresholds. Important species distribution or other relevant environmental factors are often not considered. Such approaches are inflexible, inefficient, and ineffective. In many cases, federal agencies have more flexibility under existing environmental laws and regulations and should encourage a cooperative approach toward achieving multiple goals. And where such flexibility currently exists in laws, agencies should use it promptly and with a minimum of bureaucratic delay. Time is of the essence when making water management decisions during a drought.

Aging Federal Water Infrastructure:

We must invest (and reinvest) in the Western water infrastructure necessary to meet current and future demands. Our existing water infrastructure is aging and in need of rehabilitation. We need new water storage in order to adapt to our changing hydrology and develop usable and sustainable supplies to meet growing demands for water. The federal government can continue to be partners in solving these water problems in the West by developing innovative financing mechanisms that have a very low federal cost and make water resources infrastructure development more attractive and affordable for non-federal interests to invest in projects the federal government can no longer fund. New water supplies must be developed to replace diminishing snowpack during drought conditions, provide for growing recreational and environmental needs, allow for population growth, and protect the economic vitality of the West.

Federal Headwaters Management:

In most Western states, much of the available water derives from snowmelt in the headwaters of streams and rivers in the higher elevation mountainous areas. A July 2008 report released by the National Research Council underscores the importance of forests to the Nation's water supplies. The report finds that modern forest practices have helped to protect streams and riparian zones, but more needs to be learned about the implications of such practices as thinning or partial cuts. This understanding can lead to the development of "best management practices" to, for example, help balance timber harvesting with sustainable water flow and quality.

About the Family Farm Alliance

The Family Farm Alliance (Alliance) is a grassroots organization of family farmers, ranchers, irrigation districts and allied industries in 16 Western states. The Alliance is focused on one mission: To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers. We are also committed to the fundamental proposition that Western irrigated agriculture must be preserved and protected for a host of economic, sociological, environmental and national security reasons – many of which are often overlooked in the context of other national policy decisions. The Alliance is seen as a key player in the context of Western water resource management and how this important function is impacted by implementation of federal laws and regulations.

Please contact Dan Keppen, Executive Director of the Alliance, at dankeppen@charter.net or Mark Limbaugh, The Ferguson Group, at mlimbaugh@tfgnet.com for further insights and explanations of these or other Family Farm Alliance water policy recommendations.

From: Cannon Michael

Sent: Thursday, September 8, 2016 5:01 PM

To: Johnny Amaral

CC: Daniel Bays; Mike Burns; Chase Hurley; jthomas@foley.com; David Longly Bernhardt; Todd Neves; Joe Raeder; Greg Wegis; Daniel Errotabere; James Costa Sr.; Tom Teixeira

Subject: Re: DC Trip - Dinners

Hey guys,

I'm assuming that most of you will be getting in in time for dinner on the 12th. Are you all able to join me at Carmine's? 7:30 PM is the dinner reservation. Please let me know when you have time so I can make sure we have space for everyone.

Sincerely,

Cannon Michael
Bowles Farming Company, Inc.
209-769-6777
www.bfarm.com
@agleader

On Sun, Sep 4, 2016 at 4:25 PM -0700, "Cannon Michael" <cannon@bfarm.com> wrote:

Hope you all are enjoying the weekend.

I wanted to see about coordination on dinners while we are in DC.

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A lot of us are leaving on the 15th, so I have not planned anything for that night.

Please let me know about the 12th, I will keep you posted about the 13th and please plan to keep the 14th open for the dinner with Jim.

We have a great group on the trip and I look forward to spending time with all of you.

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From: Cannon Michael

Sent: Thursday, September 8, 2016 8:37 PM

To: Ara Azhderian; Johnny Amaral

CC: Tom Teixeira; Dave Orth; David Longly Bernhardt; jthomas@foley.com; Steve Chedester; Sara Tucker; Carl Janzen; Daniel Errotabere; jwalsh@foley.com; Daniel Bays; James Costa Sr.; Mike Burns; Dan Keppen; Dan Vink; Nancy E Williams; Dennis A. Cardoza; Kent Stephens; Chase Hurley; Greg Wegis; Jason R. Phillips; Todd Neves; Joe Raeder

Subject: Re: DC Trip - Dinners

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209-769-6777

www.bfarm.com

@agleader

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Sent: Sunday, September 4, 2016 4:25 PM

Subject: DC Trip - Dinners

To: Ara Azhderian <ara.azhderian@sldmwa.org>, Johnny Amaral <jamara1@westlandswater.org>

Cc: Tom Teixeira <[REDACTED]@[REDACTED]>, David Longly Bernhardt <dbernhardt@bhfs.com>, Steve Chedester <schedester@sjrecwa.net>, <jthomas@foley.com>, Sara Tucker <sara@naturalresourceresults.com>, Dave Orth <dorth@davidorthconsulting.com>, Carl Janzen <cjanzen@madera-id.org>, Daniel Errotabere <[REDACTED]@[REDACTED]>, <jwalsh@foley.com>, James Costa Sr. <[REDACTED]@[REDACTED]>, Daniel Bays <daniel@baysranch.com>, Mike Burns <mburns@ka-pow.com>, Dan Vink <dvink@svwater.org>, Dennis A. Cardoza <dcardoza@foley.com>, Nancy E Williams <nwilliams@swaconsult.com>, Chase Hurley <chase@hmrdr.net>, Kent Stephens <kentstephens@sunviewvineyards.com>, Todd Neves <tneves@westlandswater.org>, Jason R. Phillips <jphillips@friantwater.org>, Greg Wegis <greg@wegisandyoung.com>, Joe Raeder <jraeder@tfgnet.com>

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From: Greg Wegis

Sent: Thursday, September 8, 2016 8:50 PM

To: Cannon Michael

CC: Ara Azhderian; Johnny Amaral; Tom Teixeira; Dave Orth; David Longly Bernhardt; jthomas@foley.com; Steve Chedester; Sara Tucker; Carl Janzen; Daniel Errotabere; jwalsh@foley.com; Daniel Bays; James Costa Sr.; Mike Burns; Dan Keppen; Dan Vink; Nancy E Williams; Dennis A. Cardoza; Kent Stephens; Chase Hurley; Jason R. Phillips; Todd Neves; Joe Raeder

Subject: Re: DC Trip - Dinners

Great Thanks

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Sent: Thursday, September 8, 2016 8:53 PM

To: 'Cannon Michael'; 'Ara Azhderian'; 'Johnny Amaral'

CC: 'Tom Teixeira'; 'Dave Orth'; 'David Longly Bernhardt'; jthomas@foley.com; 'Steve Chedester'; 'Sara Tucker'; 'Carl Janzen'; 'Daniel Errotabere'; jwalsh@foley.com; 'Daniel Bays'; 'James Costa Sr.'; 'Mike Burns'; 'Dan Vink'; 'Nancy E Williams'; 'Dennis A. Cardoza'; 'Kent Stephens'; 'Chase Hurley'; 'Greg Wegis'; 'Jason R. Phillips'; 'Todd Neves'; 'Joe Raeder'

Subject: RE: DC Trip - Dinners

And Pat O'Toole, Alliance president of the board.

Looking forward to seeing you all.

DK

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=====

From: Johnny Amaral
Sent: Friday, September 9, 2016 9:52 AM
To: 'Morrow, Jennifer'
Subject: Dinner monday

David Bernhardt will be joining us

From: Morrow, Jennifer
Sent: Friday, September 9, 2016 10:15 AM
To: Johnny Amaral
Subject: RE: Dinner monday

Great, that's 9 total:

AR
JP
Dan Kish
Dan Errotabere
Todd Neves
Johnny Amaral
David Valadao
Cole Rojewski
David Bernhardt

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Friday, September 09, 2016 12:52 PM
To: Morrow, Jennifer
Subject: Dinner monday

David Bernhardt will be joining us

From: Johnny Amaral
Sent: Friday, September 9, 2016 1:33 PM
To: Cannon Michael
Subject: Re: Do we have any changes or additions to the packet of information?

Ok. Then I will give David Bernhardt and his people the green light to start producing the support materials as well.

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

On Sep 9, 2016, at 1:23 PM, Cannon Michael <cannon@bfarm.com> wrote:

No think it is good

Going to email out the talking points now.

Sincerely,

Cannon Michael
Bowles Farming Company
209-752-7792 (Direct)
www.bfarm.com
@agleader

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=====

On Fri, Sep 9, 2016 at 11:01 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

From: Johnny Amaral
Sent: Saturday, September 10, 2016 10:43 AM
To: David Bernhardt
Subject: Dinner monday

Kiel weaver is coming too

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

From: Cannon Michael

Sent: Sunday, September 11, 2016 7:53 PM

To: Johnny Amaral; Ara Azhderian

CC: Dennis A. Cardoza; Jennifer Walsh; jthomas@foley.com; Joe Raeder; Nancy E Williams; David Longly Bernhardt; Sara Tucker; Mike Burns; Chase Hurley; Steve Chedester; Dan Vink; Dave Orth; Jason R. Phillips; Todd Neves; Carl Janzen; Kent Stephens; Daniel Errotabere; Tom Teixeira; Greg Wegis; James Costa Sr.; Daniel Bays; Dan Keppen

Subject: DC Trip - Attire

Hello all,

I plan to wear slacks and a coat to the meeting - no tie. Not that anyone cares, but thought I would throw it out there.

Looking forward to seeing you over the next few days - best of luck with your travel.

Sincerely,

Cannon Michael
Bowles Farming Company
209-752-7792 (Direct)
www.bfarm.com
[@agleader](mailto:cannon@bfarm.com)

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=====

On Fri, Sep 9, 2016 at 2:08 PM, Cannon Michael <cannon@bfarm.com> wrote:

Thanks to the hard work of our great DC team (Jennifer Walsh in particular), we have a new schedule for next week.

I highly suggest you pack some comfortable shoes and make sure you get some rest this weekend - next week will be a whirlwind.

Best to all of you and see you next week.

Sincerely,

Cannon Michael
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Growers - please take the time to review the talking points prior to your arrival. Try to find points that you feel passionate about or that you can relate to your own experiences - this always seems to work the best. Our lobbyists and others have put a lot of work into setting everything up for the trip and all the meetings - please take the time and prepare for the meetings and be ready to participate. No sense in taking time from your business and family if you are not willing to let your voice be heard.

For those arriving on the 12th - note dinner at Carmine's at 7:30 p.m.

ALSO NOTE THE BREAKFAST ON THE 13TH - this is important!

8:00 a.m. **Group Coordination Breakfast**

Dirksen Senate Office Building Cafeteria, Basement Level (not the Senate Buffet, which is down the hall)

I really look forward to spending time with all of you and working the Hill with you. Any questions or comments, feel free to contact me.

Safe travels and have a great weekend.

Sincerely,

Cannon Michael
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=====

From: DCardoza@foley.com
Sent: Sunday, September 11, 2016 8:13 PM
To: Cannon Michael
CC: Johnny Amaral; Ara Azhderian; JWalsh@foley.com; JThomas@foley.com; Joe Raeder; Nancy E Williams; David Longly Bernhardt; Sara Tucker; Mike Burns; Chase Hurley; Steve Chedester; Dan Vink; Dave Orth; Jason R. Phillips; Todd Neves; Carl Janzen; Kent Stephens; Daniel Errotabere; Tom Teixeira; Greg Wegis; James Costa Sr.; Daniel Bays; Dan Keppen
Subject: Re: DC Trip - Attire

Tie or no tie works either way. Looks like things are all in order. For those who have never been here while Congress is in session, expect many changes to the Schedule due to votes and last minute meetings. Looking forward to seeing you all at least one evening.

Warm regards,

Dennis

Sent from my iPhone

Please excuse any auto correct errors

On Sep 11, 2016, at 10:54 PM, Cannon Michael <cannon@bfarm.com<<mailto:cannon@bfarm.com>>> wrote:

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www.bfarm.com<https://urldefense.proofpoint.com/v2/url?u=http-3A-www.bfarm.com&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkjCNM24pCPMnJRMu5cnOh9t0O7w&m=ycAvJEownFVXykN3si0S4zbU4cIFq7tEILu65T1c_QQ&s=OOChdAj7TmQ2tuwFjulKq8698poHkHYBO-grOejigvQ&e=>>
@agleader<https://urldefense.proofpoint.com/v2/url?u=https-3A-twitter.com_agleader&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkjCNM24pCPMnJRMu5cnOh9t0O7w&m=ycAvJEownFVXykN3si0S4zbU4cIFq7tEILu65T1c_QQ&s=BQgZ5axM_w2gWPWbviHlv4HSlzc3FxbR4rIfQjiyZ0Q&e=>>

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Sincerely,

Cannon Michael

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www.bfarm.com<[https://urldefense.proofpoint.com/v2/url?u=http-](https://urldefense.proofpoint.com/v2/url?u=http-3A_www.bfarm.com&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t0O7w&m=ycAvJEownFVXykN3si0S4zbU4cIFq7tEILu65T1c_QQ&s=OOChdAj7TmQ2tuwFjulKq8698poHkHYBO-grOejigvQ&e=>)

[3A_www.bfarm.com&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t0O7w&m=ycAvJEownFVXykN3si0S4zbU4cIFq7tEILu65T1c_QQ&s=OOChdAj7TmQ2tuwFjulKq8698poHkHYBO-grOejigvQ&e=>](https://urldefense.proofpoint.com/v2/url?u=http-3A_www.bfarm.com&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t0O7w&m=ycAvJEownFVXykN3si0S4zbU4cIFq7tEILu65T1c_QQ&s=OOChdAj7TmQ2tuwFjulKq8698poHkHYBO-grOejigvQ&e=>)

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[3A_twitter.com_agleader&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t0O7w&m=ycAvJEownFVXykN3si0S4zbU4cIFq7tEILu65T1c_QQ&s=BQgZ5axM_w2gWPWbvHlv4HSlzc3FxbR4rIfQjiyZ0Q&e=>](https://urldefense.proofpoint.com/v2/url?u=https-3A_twitter.com_agleader&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t0O7w&m=ycAvJEownFVXykN3si0S4zbU4cIFq7tEILu65T1c_QQ&s=BQgZ5axM_w2gWPWbvHlv4HSlzc3FxbR4rIfQjiyZ0Q&e=>)

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Sincerely,

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[3A_www.bfarm.com&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t0O7w&m=ycAvJEownFVXykN3si0S4zbU4cIFq7tEILu65T1c_QQ&s=OOChdAj7TmQ2tuwFjulKq8698poHkHYBO-grOejigvQ&e=>](https://urldefense.proofpoint.com/v2/url?u=http-3A_www.bfarm.com&d=DQMFaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t0O7w&m=ycAvJEownFVXykN3si0S4zbU4cIFq7tEILu65T1c_QQ&s=OOChdAj7TmQ2tuwFjulKq8698poHkHYBO-grOejigvQ&e=>)

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From: Johnny Amaral

Sent: Monday, September 12, 2016 8:48 AM

To: David Bernhardt; Denny Rehberg; Dennis Cardoza; <Empty>; Catherine Karen; Ryan A. 'Smith

Subject: No call today

I'm flying to DC at the moment. Just hopped on my connector flight. Will be on the ground in DC at 4pm est.

Best,

Johnny Amaral

Deputy General Manager - External Affairs

Westlands Water District

From: Ara Azhderian
Sent: Monday, September 12, 2016 10:28 AM
To: Bernhardt, David L.
CC: Noles, Holly A.; Jason Peltier; Johnny Amaral; Cannon Michael
Subject: RE: Re: thoughts
Attachments: Allied Growers DC Trip September 2016 - FINAL.pptx

Hi David,

Attached is the final meetings material. Can you please print an appropriate number? I believe there are 18 meetings currently scheduled. I can swing by and pick them up if that works for you.

Best,
ara

From: Bernhardt, David L. [mailto:DBernhardt@BHFS.com]
Sent: Monday, September 12, 2016 7:55 AM
To: Ara Azhderian <ara.azhderian@sldmwa.org>
Cc: Noles, Holly A. <HNOLES@bhfs.com>
Subject: RE: Re: thoughts

Ara: What are the contacts that go on the front of the document? Do you want to simply send me a final version and we will print it out?

From: Ara Azhderian [mailto:ara.azhderian@sldmwa.org]
Sent: Monday, September 12, 2016 10:45 AM
To: Bernhardt, David L.
Subject: Fwd: Re: thoughts

Hi Dave,

I can email you the material or walk it by... Any preference?

Sent from my Verizon Wireless 4G LTE DROID

----- Forwarded message -----

From: Jason Peltier <jason.peltier@sldmwa.org>

Date: Sep 12, 2016 10:04 AM

Subject: Re: thoughts

To: Ara Azhderian <ara.azhderian@sldmwa.org>

Cc: Cannon Michael <cannon@bfarm.com>, Johnny Amaral <jamaryl@westlandswater.org>, David Bernhardt <dbernhardt@bhfs.com>

Good. Though the size of Maryland and population of Oregon seem small. On population I say the same as a medium sized state...

On Sep 11, 2016, at 7:42 PM, Ara Azhderian <ara.azhderian@sldmwa.org> wrote:

Hi guys,

I tried to put together the attached to explain the water supply situation in a way that illustrates the need to do something now. Thoughts? If you can get back to me by tomorrow morning, I can get to David in time to publish for the meetings. If you don't like it, let me know. If you do, I was thinking to list out the participants and email addresses on the first page for potential future contact. All comments welcome... travel safe.

Best,

ara

<Allied Growers DC Trip September 2016 - DRAFT.pptx>

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ALLIED GROWERS

Farmers from California's San Joaquin Valley
concerned with the future of the
Country's most productive agricultural region

Carl Janzen	cjanzen@madera-id.org
Kent Stephens	[REDACTED]
James Costa, Sr.	[REDACTED]
Daniel Bays	[REDACTED]
Todd Neves	tneves@westlandswater.org
Dan Errotabere	[REDACTED]
Greg Wegis	Greg@wegisandyoung.com
Cannon Michael	cannon@bfarm.com
Tom Teixeira	[REDACTED]

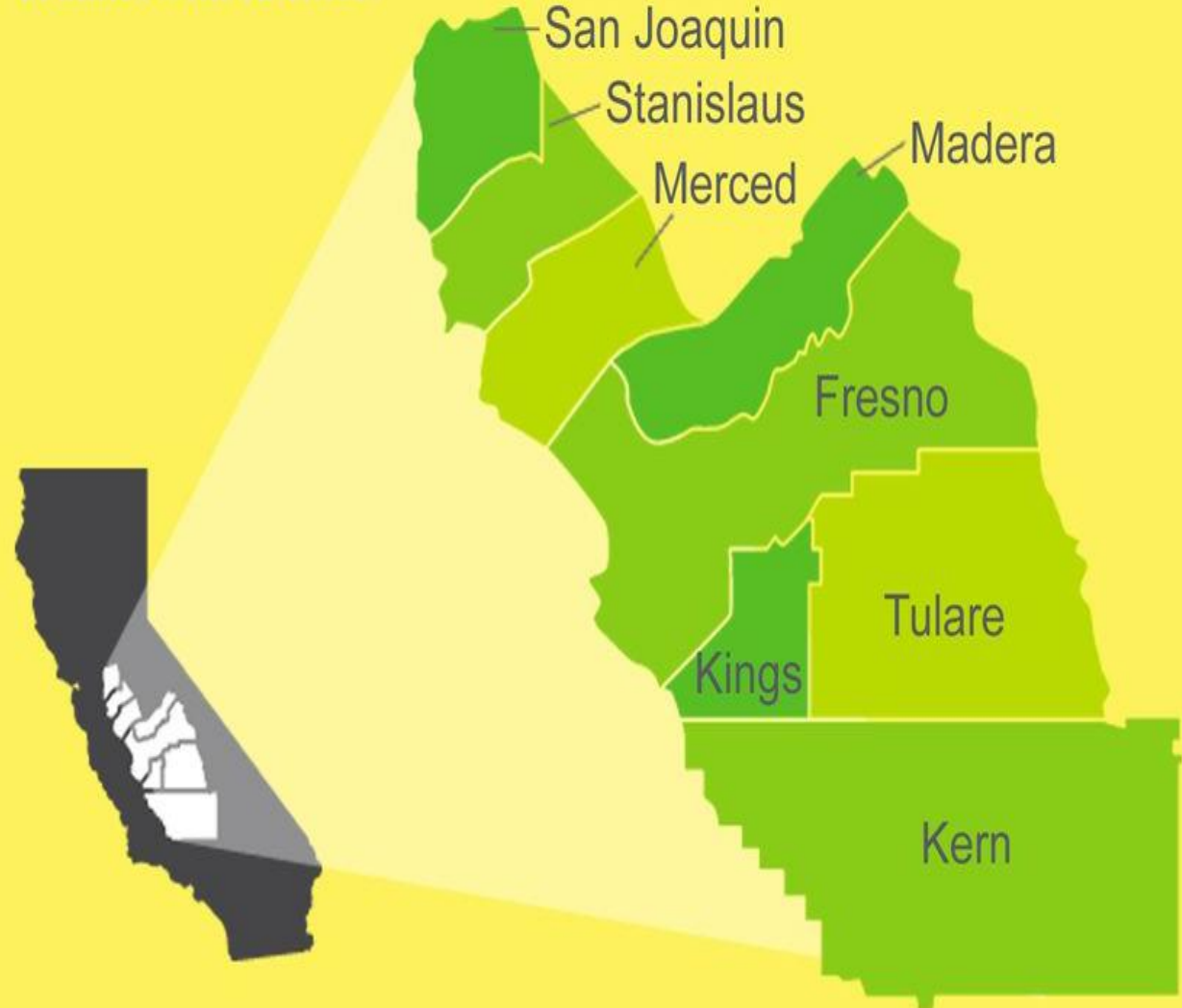
IRREPLACEABLE

- ❖ California's San Joaquin Valley
- ❖ The size of West Virginia
- ❖ The population of Oregon
- ❖ Only Mediterranean Climate in North America
- ❖ Home to 7 of the Nation's top 10 agricultural producing counties
- ❖ Produces over 350 different crops
- ❖ 1/3 of the Nation's vegetables
- ❖ 2/3 of the Nation's fruits and nuts
- ❖ Millions of jobs and billions in economic activity

Just add water

The San Joaquin Valley

Comprised of eight counties with 62 cities:



California is a hydraulic society

virtually every region is dependent upon imported water

California's Central Valley
& State Water Projects



CVP & SWP DIRECTLY SERVE

- About 25 million people
 - Nearly 2/3's of Californians
 - Majority of State's \$2 Trillion Economy
 - Top 5 Industries: High Tech, Ag, Aerospace, Service, and Motion Picture
- 7 of the nation's top 10 ag counties
 - #1 US producer of nearly 80 crops
 - Over a dozen crops grown exclusively
 - Primary socio-economic fabric of Central Valley – an area the size of Colorado
- 2nd largest contiguous wetlands in US
 - Vital link in the Pacific Flyway
 - Home to numerous listed species
 - Migratory Bird Treaty Act of 1918
 - Ramsar Convention and Western Hemispheric Shorebird Reserve Network recognize Grasslands as an area of international Importance

2016 CVP Water Supply

NORTH OF DELTA WATER SUPPLY



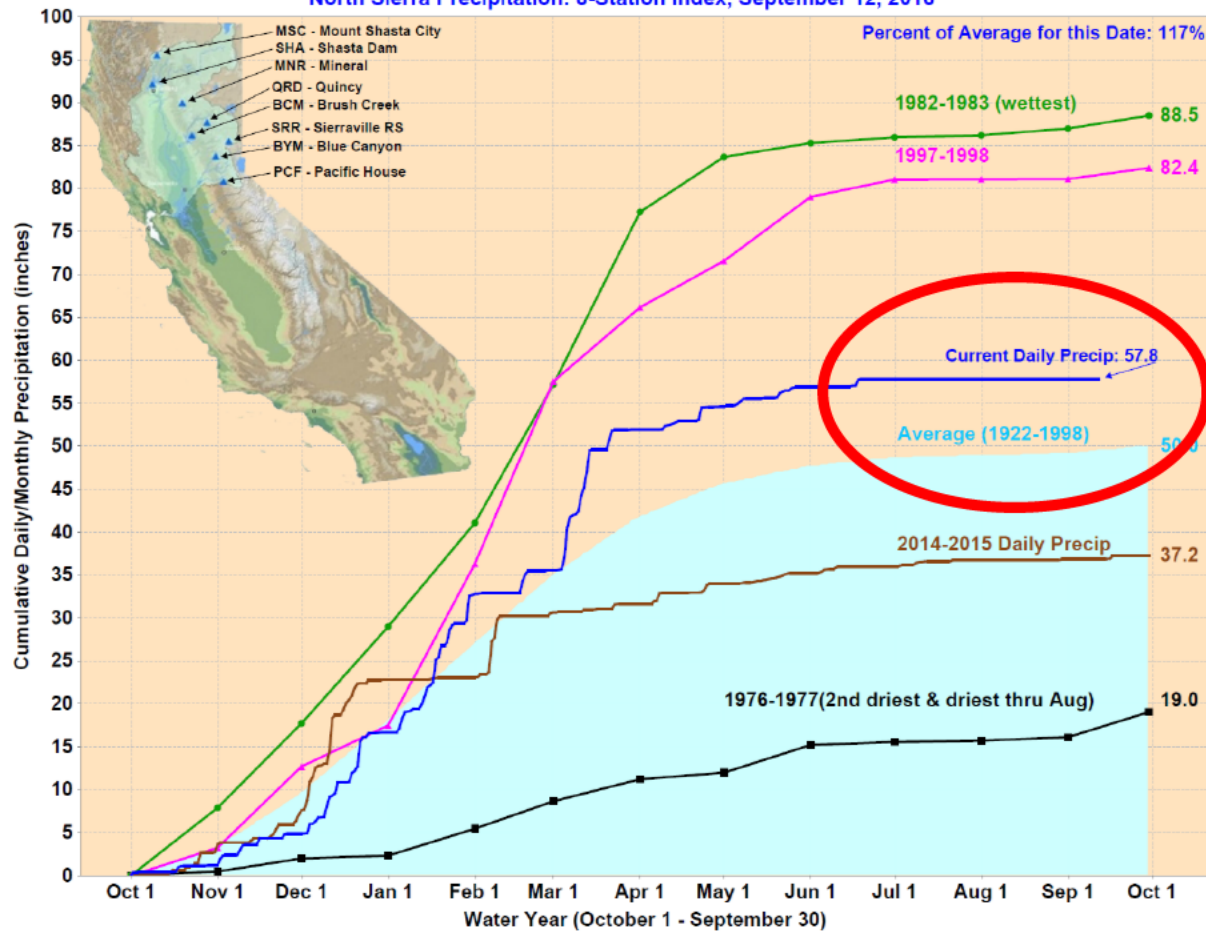
SOUTH OF DELTA WATER SUPPLY



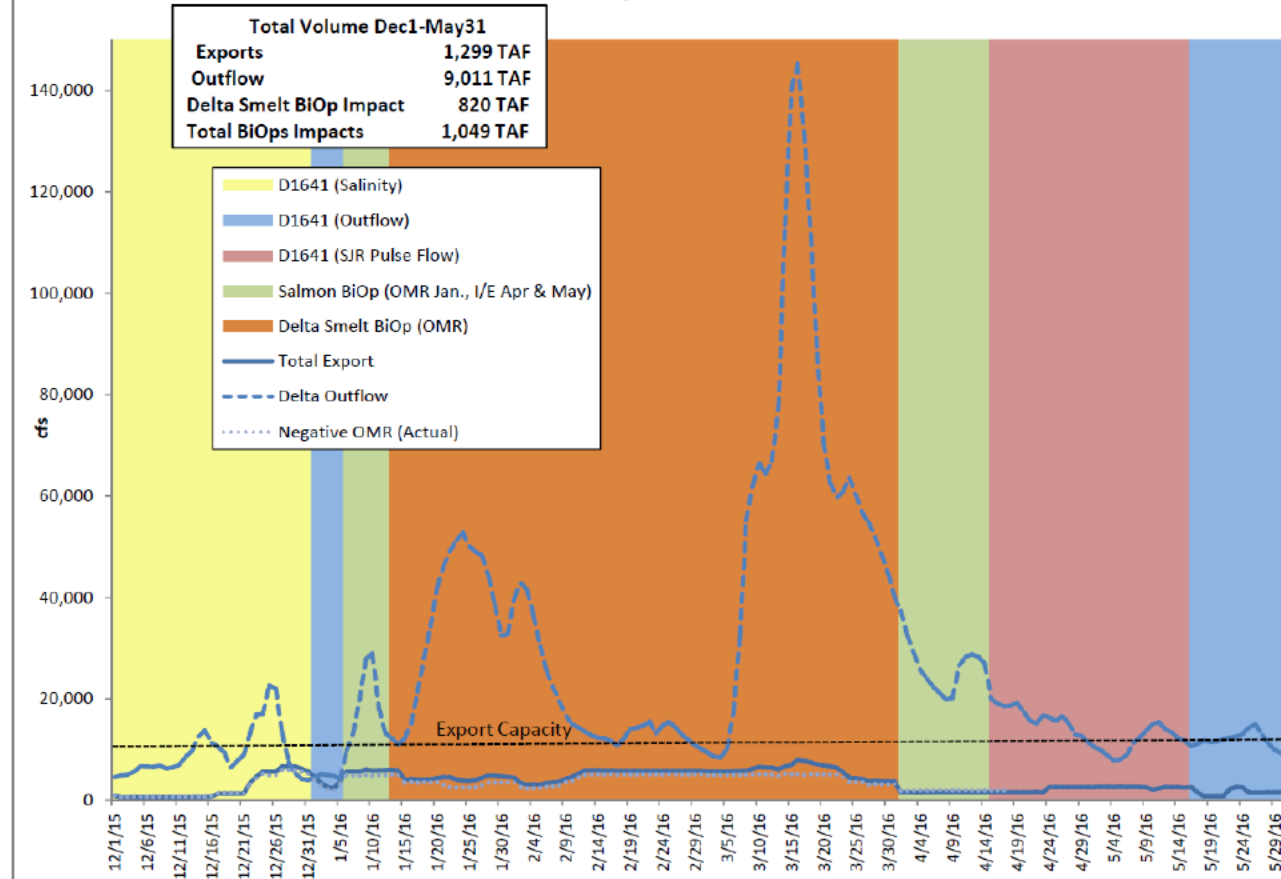
REGULATORY STRANGLEHOLD

Despite abundant northern California rainfall, decisions to limit pumping cost over 1 million acre-feet of water, with NO demonstrable fish benefit

North Sierra Precipitation: 8-Station Index, September 12, 2016



2016 Export Constraints

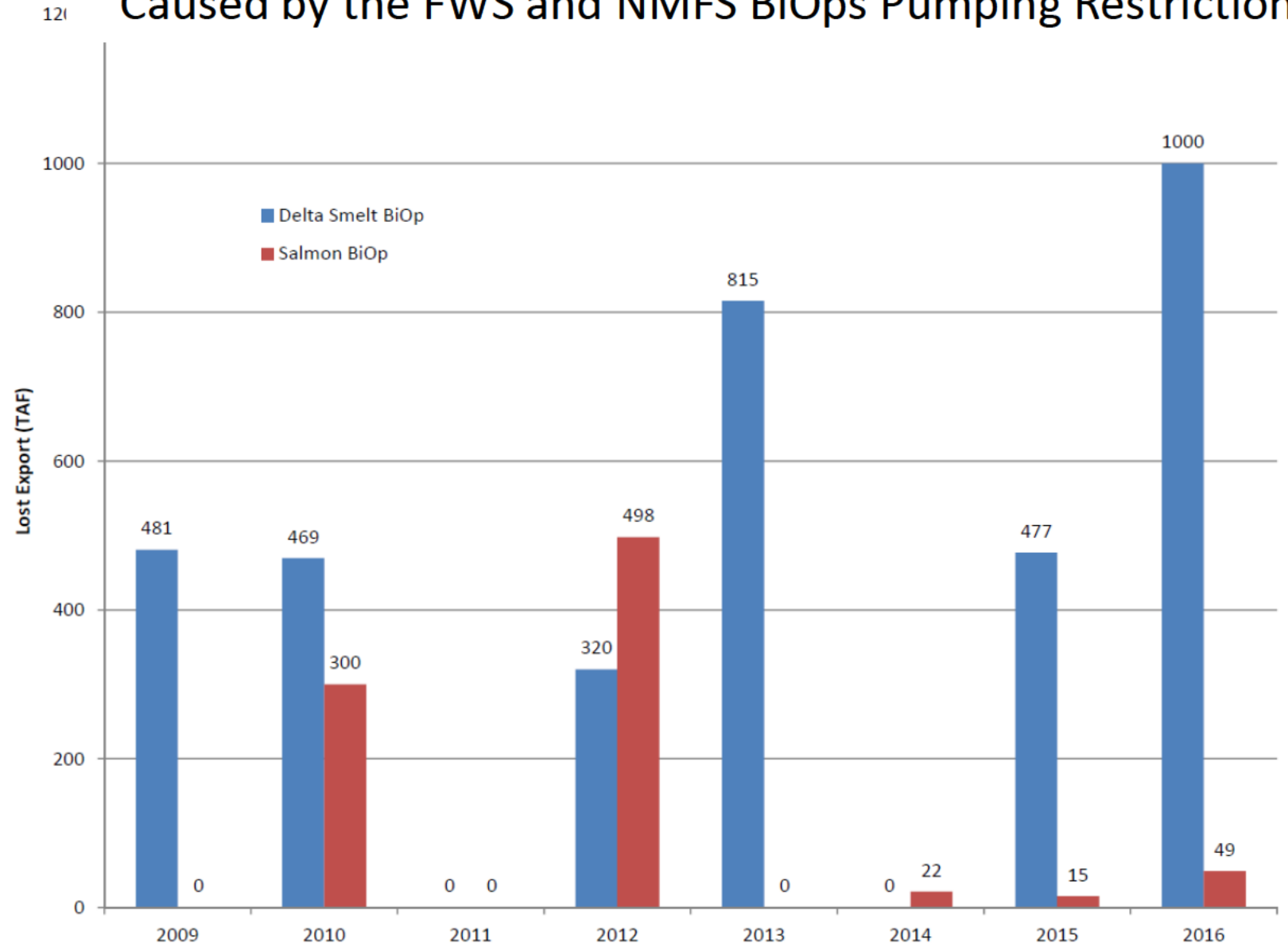


“OMR”

Old & Middle River
calculated “reverse” flow

- ❖ In the FWS & NMFS BiOps, federal regulators hypothesize that “reverse” flows hurt fish populations
- ❖ While a number of factors affect OMR, generally, the higher the rate of pumping the more negative the “reverse” flow
- ❖ By imposing an absolute limit on OMR of -5,000 cfs, with discretion to set it as low as -1,250 cfs, federal regulators have effectively severed the south of Delta CVP-SWP water supply from weather, the lost water just flows into the ocean
- ❖ Since imposition of the BiOps, federal pumping restrictions have cost the CVP-SWP nearly 4.5 million acre-feet of water, billions of dollars, thousands of jobs, an untold hopes and dreams
- ❖ In the nearly 10 years since OMR was first imposed, the fish agencies have never tested its hypothesis

CVP-SWP Water Supply Costs December thru June
Caused by the FWS and NMFS BiOps Pumping Restrictions



Federal Appeals Court upheld the legality of the BiOps NOT the science

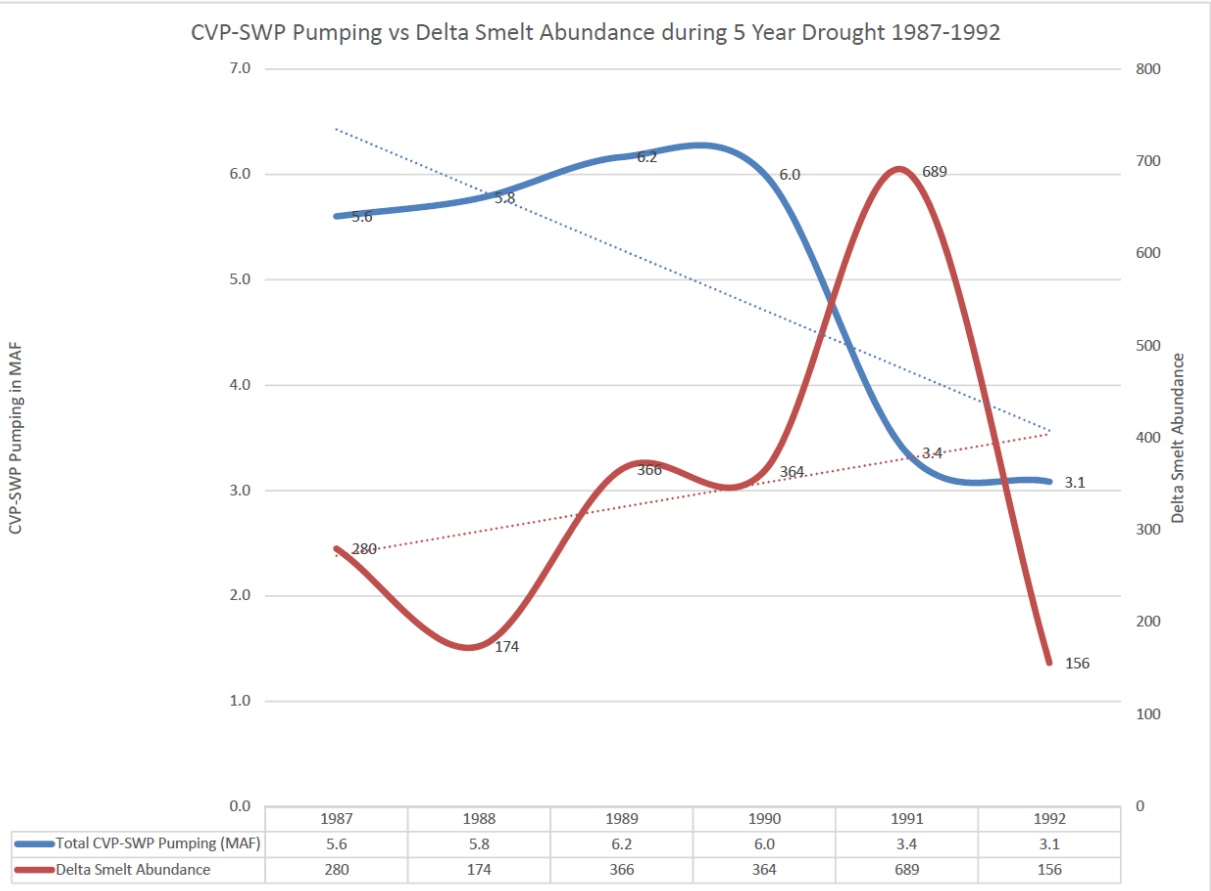
US NINTH CIRCUIT COURT OF APPEALS

IV. MERITS OF THE [FWS] BiOp

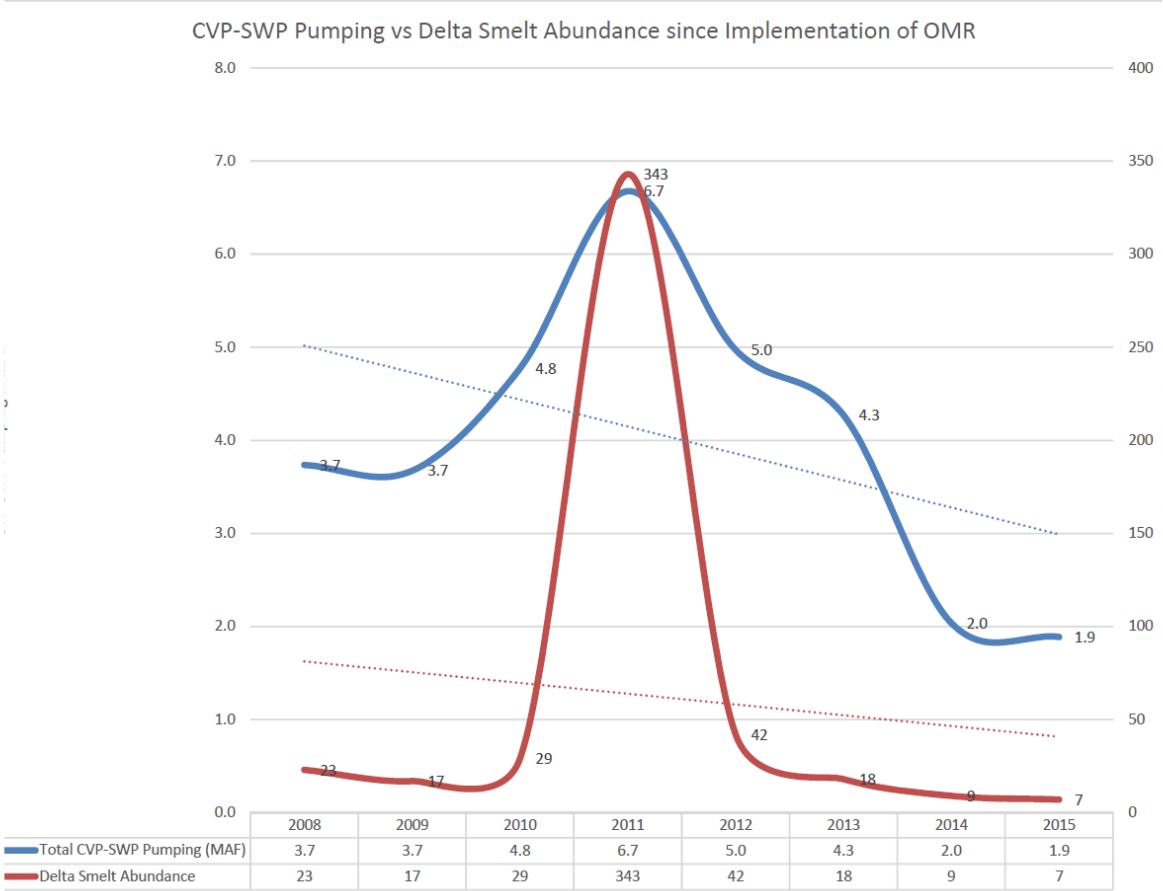
“Before we consider the challenges to the BiOp, we have some preliminary observations. First, the BiOp is a bit of a mess. And not just a little bit of a mess, but, at more than 400 pages, a big bit of a mess. And the FWS knew it.” page 604

Since imposition of OMR pumping restrictions, Delta smelt abundance has continued to decline. Some blame drought and lack of flow, but during the last 5 year drought, Delta smelt abundance, which is historically variable, trended upward thru most of it, while the CVP and SWP pumped at least a million acre-feet more water per year.

Pumping & Delta Smelt Abundance during 5 year drought – 1988-1992



Pumping & Delta Smelt Abundance since OMR – 2008-2015



Federal pumping restrictions have done nothing to stem the declines of Delta smelt and winter-run salmon

**Farmworkers in line for food from
China – City of San Joaquin**



Farmworker despair – City of Huron



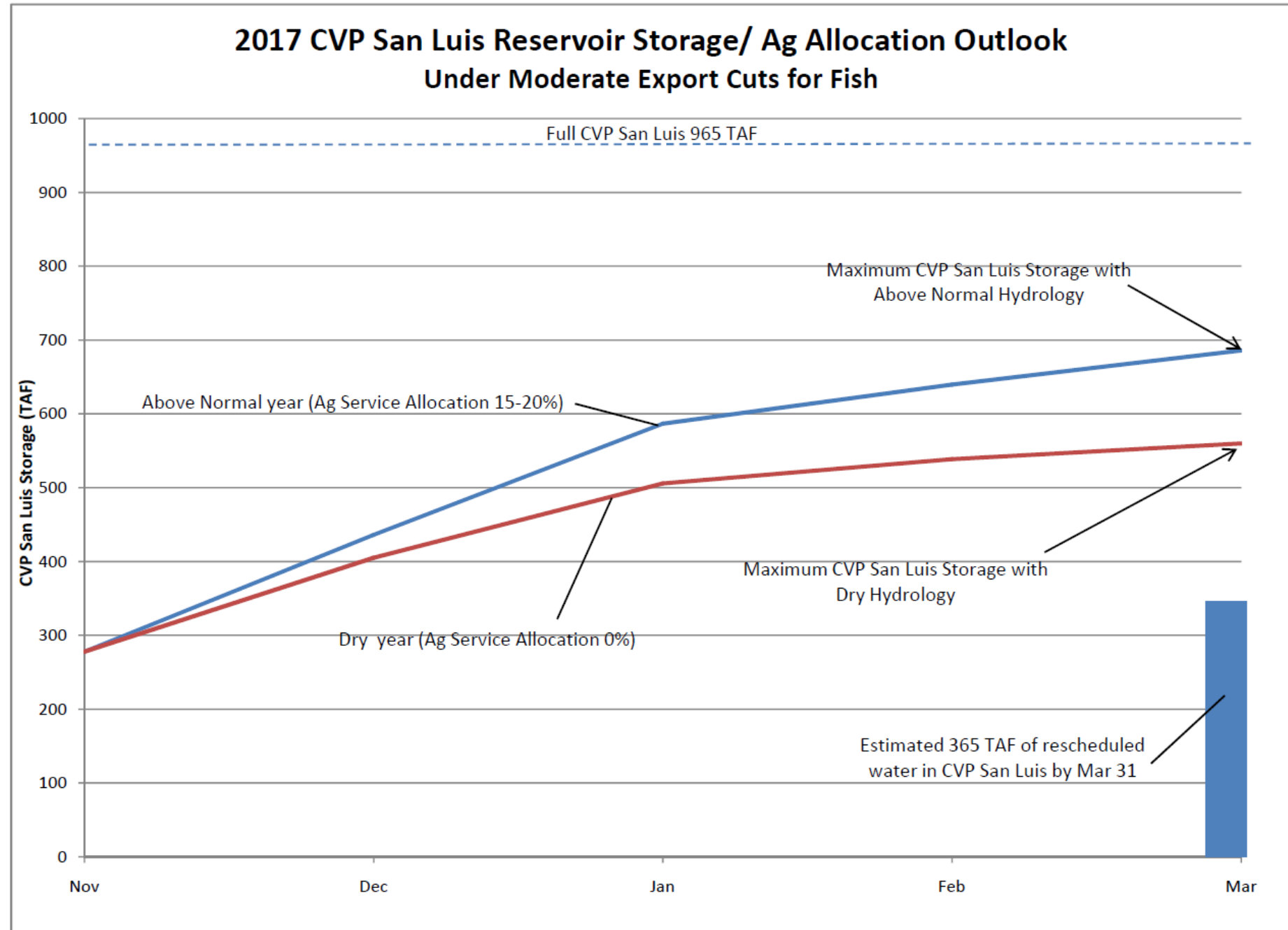
“There is no single cause for the decline of these [Bay-Delta] fishes”

Public Policy Institute of California

- Physical Habitat Loss and Alteration:
 - Draining and Leveeing of Tidal Marshes, loss of Seasonal Flood Plains and Riparian Forest
- Invasive Species:
 - Predation and Alteration of Food Web
- Water Quality:
 - Homogenized Water Quality, Discharge of Nutrients and Toxics
- Fisheries Management:
 - Hatchery and Harvest Operations and Regulation

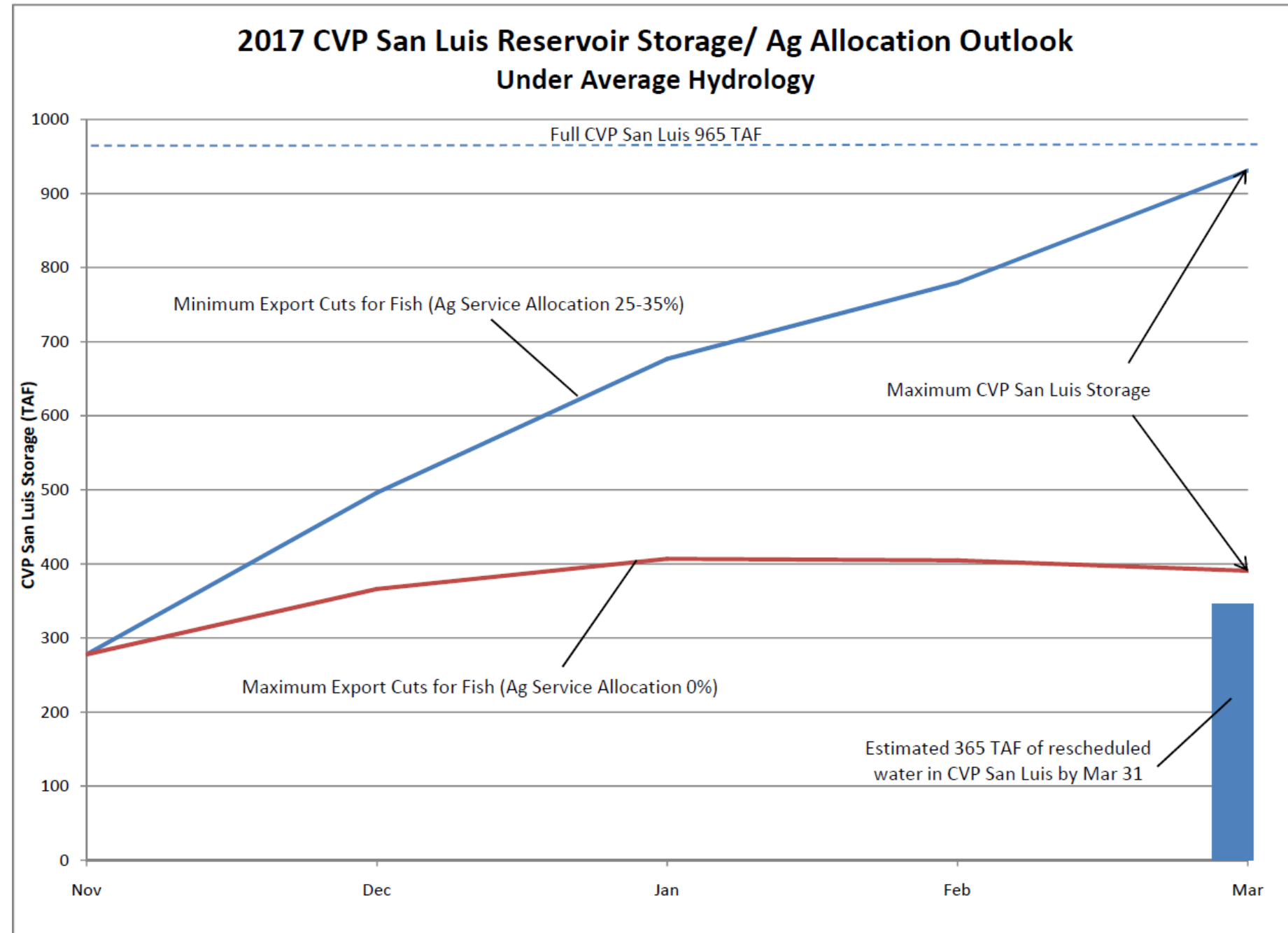
2017 Weather Driven Scenario

- ❖ Assumes moderate BiOps pumping restrictions
- ❖ Compares an above normal winter to a dry winter
- ❖ The difference in south of Delta CVP water supply is about 150,000 acre-feet
- ❖ Above normal winter, ag allocation = up to 20%
- ❖ Dry winter, ag allocation = 0%



2017 Policy Driven Scenario

- ❖ Assumes an average winter
- ❖ Compares the BiOps maximum pumping restrictions to the minimum restrictions
- ❖ The difference in south of Delta CVP water supply is about 500,000 acre-feet
- ❖ Minimum pumping restrictions, ag allocation = up to 35%
- ❖ Maximum pumping restrictions, ag allocation = 0%
- ❖ Policy choices can produce over 3 times more water than weather



Policy choices, not mother nature, are causing extraordinary human suffering

“

**FAILURE IS SIMPLY
THE OPPORTUNITY
TO BEGIN AGAIN,
THIS TIME MORE INTELLIGENTLY.**

”

From: Johnny Amaral
Sent: Monday, September 12, 2016 2:53 PM
To: David Bernhardt
Subject: Reminder

Dinner reservations are at 7 PM at the capital Grille under my name. Myself and our two directors should be getting there about a 6:45

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

From: Bernhardt, David L.
Sent: Tuesday, September 13, 2016 6:46 AM
To: pwilliams@westlandswater.org
Subject: Erroneous Email

Phil: I apologize for the errant email this morning.

David Bernhardt

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From: David Bernhardt
Sent: Thursday, September 15, 2016 5:46 PM
To: Mark Rhodes
Subject: Mark, please add me to your LinkedIn network



Mark Rhodes



Hi Mark, I'd like to join your LinkedIn network.

David Bernhardt

Energy, Natural Resources and Administrative Law Attorney
Washington D.C. Metro Area

[View profile](#)

[Accept](#)

[Unsubscribe](#) | [Help](#)

You are receiving Invitation emails.

This email was intended for Mark Rhodes (Resources Analyst at Westlands Water District). [Learn why we included this.](#)



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From: Ara Azhderian
Sent: Monday, September 19, 2016 2:58 PM
To: Johnny Amaral; DCardoza@foley.com
CC: Jason Peltier; David Bernhardt; Ed Manning; Dan Keppen
Subject: RE: Clinton plans while Trump scoffs on water, environment - San Francisco Chronicle

And that is not a bad metric.

a

-----Original Message-----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]

Sent: Monday, September 19, 2016 7:49 AM

To: DCardoza@foley.com

Cc: Jason Peltier <jason.peltier@sldmwa.org>; Ara Azhderian <ara.azhderian@sldmwa.org>; David Bernhardt <dbernhardt@bhfs.com>; Ed Manning <emanning@ka-pow.com>; Dan Keppen <dankeppen@charter net>

Subject: Re: Clinton plans while Trump scoffs on water, environment - San Francisco Chronicle

I'm not sure how I see a plan that calls for spending billions and billions and billions dollars to be any different than what we've experienced the last eight years.

Generally speaking, if Peter Gleick is for it... I'm against it

Best,

Johnny Amaral
Deputy General Manager - External Affairs Westlands Water District

> On Sep 19, 2016, at 7:44 AM, "DCardoza@foley.com" <DCardoza@foley.com> wrote:

>

> No matter who gets elected they have to be better than the current
> administration! Dennis

>

> Sent from my iPhone

>

> Please excuse any auto correct errors

>

>> On Sep 19, 2016, at 10:28 AM, Jason Peltier <jason.peltier@sldmwa.org> wrote:

>>

>> Tool

>>

>> [https://urldefense.proofpoint.com/v2/url?u=http-3A__www.sfchronicle.c](https://urldefense.proofpoint.com/v2/url?u=http-3A__www.sfchronicle.com_nation_article_Clinton-2Dplans-2Dwhile-2DTrump-2Dscoffs-2Don-2Dwater-2D9230814.php&d=DQIFAg&c=R1m5WhGmP8srpDE4r86Q&r=yhMHKvJkYaWoH8bk)

>> [om_nation_article_Clinton-2Dplans-2Dwhile-2DTrump-2Dscoffs-2Don-2Dwat](https://urldefense.proofpoint.com/v2/url?u=http-3A__www.sfchronicle.com_nation_article_Clinton-2Dplans-2Dwhile-2DTrump-2Dscoffs-2Don-2Dwater-2D9230814.php&d=DQIFAg&c=R1m5WhGmP8srpDE4r86Q&r=yhMHKvJkYaWoH8bk)

>> [er-2D9230814.php&d=DQIFAg&c=R1m5WhGmP8srpDE4r86Q&r=yhMHKvJkYaWoH8bk](https://urldefense.proofpoint.com/v2/url?u=http-3A__www.sfchronicle.com_nation_article_Clinton-2Dplans-2Dwhile-2DTrump-2Dscoffs-2Don-2Dwater-2D9230814.php&d=DQIFAg&c=R1m5WhGmP8srpDE4r86Q&r=yhMHKvJkYaWoH8bk)

>> [mjCNM24pCPMnJRMu5cnOh9t0O7w&m=ISEsvZivINPJINw-RTsrX0IQ4ymgfrtjPizhbY0](https://urldefense.proofpoint.com/v2/url?u=http-3A__www.sfchronicle.com_nation_article_Clinton-2Dplans-2Dwhile-2DTrump-2Dscoffs-2Don-2Dwater-2D9230814.php&d=DQIFAg&c=R1m5WhGmP8srpDE4r86Q&r=yhMHKvJkYaWoH8bk)

>> [X4S0&s=tPU8FAphQdyKG0pfhPxdn4wlRiRf2uR2qmtK9yysbKc&e=](https://urldefense.proofpoint.com/v2/url?u=http-3A__www.sfchronicle.com_nation_article_Clinton-2Dplans-2Dwhile-2DTrump-2Dscoffs-2Don-2Dwater-2D9230814.php&d=DQIFAg&c=R1m5WhGmP8srpDE4r86Q&r=yhMHKvJkYaWoH8bk)

>

> The preceding email message may be confidential or protected by the attorney-client privilege. It is not intended for transmission to, or receipt by, any unauthorized persons. If you have received this message in error, please (i) do not read it, (ii) reply to the sender that you received the message in error, and (iii) erase or destroy the message. Legal advice contained in the preceding message is solely for the benefit of the Foley & Lardner LLP client(s) represented by the Firm in the particular matter that is the subject of this message, and may not be relied upon by any other party.

From: David Bernhardt via LinkedIn
Sent: Tuesday, September 20, 2016 2:29 PM
To: Mark Rhodes
Subject: David Bernhardt's invitation is waiting for your response



David Bernhardt invited you to connect 5 days ago.

[Accept invite](#)

[View Invitation](#)

David Bernhardt

Energy, Natural Resources and Administrative Law Attorney
2 shared connections

[View profile ▶](#)

You are receiving invitation reminder emails. [Unsubscribe](#)

This email was intended for Mark Rhodes (Resources Analyst at Westlands Water District). [Learn why we included this.](#)
If you need assistance or have questions, please contact [LinkedIn Customer Service](#).

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From: Bernhardt, David L.
Sent: Wednesday, September 21, 2016 1:43 PM
To: 'msehnert@ducks.org'; 'Karen Clark'
Subject: Meeting on October 6

Mary and Karen: I wanted to introduce both of you. Earlier this week Dale Hall expressed to me that he was interested in meeting with Tom Birmingham, the General Manager of Westlands on October 6 or 7th in Sacramento CA. I reached out to Tom who is available in the afternoon of October 6. I am introducing the two of you so that you can work through the logistics and see if meeting can happen. Obviously, I do not need to be in the middle of your efforts, but I wanted to connect the two of you.

Respectfully,
David Bernhardt

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From: Mary Sehnert
Sent: Thursday, September 22, 2016 6:42 AM
To: kclark@westlandswater.org
Subject: Meeting on October 6

Good morning, Karen. Regarding the email below, Dale Hall will be in Sacramento on October 6 and could meet with Tom Birmingham at 2 p.m. if that fits his schedule. Please let me know if that time works for you and provide an address for the meeting.

Thanks and have a great day. Mary

From: Bernhardt, David L. [mailto:DBernhardt@BHFS.com]
Sent: Wednesday, September 21, 2016 3:43 PM
To: Mary Sehnert <msehnert@ducks.org>; 'Karen Clark' <kclark@westlandswater.org>
Subject: Meeting on October 6

Mary and Karen: I wanted to introduce both of you. Earlier this week Dale Hall expressed to me that he was interested in meeting with Tom Birmingham, the General Manager of Westlands on October 6 or 7th in Sacramento CA. I reached out to Tom who is available in the afternoon of October 6. I am introducing the two of you so that you can work through the logistics and see if meeting can happen. Obviously, I do not need to be in the middle of your efforts, but I wanted to connect the two of you.

Respectfully,
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From: Karen Clark
Sent: Thursday, September 22, 2016 9:09 AM
To: 'Mary Sehnert'
CC: kclark@westlandswater.org
Subject: RE: Meeting on October 6

Hello Mary,

Would it be possible to meet later in the afternoon, perhaps at 4:00 p.m. or later? I could also turn this into a dinner meeting if necessary. Tom has a meeting out of town on October 6 and doesn't have enough time to travel back to Sacramento to make a 2:00 p.m. meeting.

Best,

~Karen

Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) [REDACTED]
(f) 559.241.6277
Email: kclark@westlandswater.org

From: Mary Sehnert [mailto:msehnert@ducks.org]
Sent: Thursday, September 22, 2016 6:42 AM
To: kclark@westlandswater.org
Subject: Meeting on October 6

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Thanks and have a great day. Mary

From: Bernhardt, David L. [mailto:DBernhardt@BHFS.com]
Sent: Wednesday, September 21, 2016 3:43 PM
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Subject: Meeting on October 6

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Respectfully,
David Bernhardt

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From: Mary Sehnert
Sent: Thursday, September 22, 2016 9:25 AM
To: Karen Clark
Subject: RE: Meeting on October 6

Karen – 4 or 4:30 p.m. will be fine if that works better for you. Please let me know and provide a street address.

Thanks. Mary

From: Karen Clark [mailto:kclark@westlandswater.org]
Sent: Thursday, September 22, 2016 11:09 AM
To: Mary Sehnert <msehnert@ducks.org>
Cc: kclark@westlandswater.org
Subject: RE: Meeting on October 6

Hello Mary,

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Best,

~Karen

Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) [REDACTED]
(f) 559.241.6277
Email: kclark@westlandswater.org

From: Mary Sehnert [mailto:msehnert@ducks.org]
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From: Johnny Amaral
Sent: Thursday, September 22, 2016 12:43 PM
To: David Bernhardt
Subject: Round and round we go....

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

From: Karen Clark
Sent: Thursday, September 22, 2016 1:01 PM
To: 'Mary Sehnert'
Subject: RE: Meeting on October 6

Hi Mary,

4:30 p.m. on October 6 is confirmed on Tom's calendar. The meeting will take place at Kronick, Moskovitz, Tiedemann & Girard, 400 Capitol Mall, 27th Floor, Sacramento.

Thank you very much for helping to coordinate this.

Best,

~Karen

Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) [REDACTED]
(f) 559.241.6277
Email: kclark@westlandswater.org

From: Mary Sehnert [mailto:msehnert@ducks.org]
Sent: Thursday, September 22, 2016 9:25 AM
To: Karen Clark
Subject: RE: Meeting on October 6

Karen – 4 or 4:30 p.m. will be fine if that works better for you. Please let me know and provide a street address.

Thanks. Mary

From: Karen Clark [mailto:kclark@westlandswater.org]
Sent: Thursday, September 22, 2016 11:09 AM
To: Mary Sehnert <msehnert@ducks.org>
Cc: kclark@westlandswater.org
Subject: RE: Meeting on October 6

Hello Mary,

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Best,

~Karen

Karen Clark
Executive Assistant to Thomas W. Birmingham

Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) [REDACTED]
(f) 559.241.6277
Email: kclark@westlandswater.org

From: Mary Sehnert [<mailto:msehnert@ducks.org>]
Sent: Thursday, September 22, 2016 6:42 AM
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Thanks and have a great day. Mary

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From: Mary Sehnert
Sent: Thursday, September 22, 2016 1:03 PM
To: Karen Clark
Subject: RE: Meeting on October 6

Karen – that is good. I will add the meeting to Dale's calendar.

Have a great day. Mary

From: Karen Clark [mailto:kclark@westlandswater.org]
Sent: Thursday, September 22, 2016 3:01 PM
To: Mary Sehnert <msehnert@ducks.org>
Subject: RE: Meeting on October 6

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Karen Clark
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Best,

~Karen

Karen Clark

Executive Assistant to Thomas W. Birmingham

Westlands Water District

P.O. Box 6056

Fresno, CA 93703

(c) [REDACTED]

(f) 559.241.6277

Email: kclark@westlandswater.org

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To: kclark@westlandswater.org

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Respectfully,
David Bernhardt

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From: Bernhardt, David L.
Sent: Friday, September 30, 2016 7:37 AM
To: kclark@westlandswater.org
Subject: Ducks unlimited

Karen: Is the meeting with Dale Hall set for next week?

David Bernhardt

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From: Karen Clark
Sent: Friday, September 30, 2016 8:47 AM
To: 'Bernhardt, David L.'
Subject: RE: Ducks unlimited

Hello David,

Yes, 4:30 p m. on October 6 at Tom's office in Sacramento.

~Karen
Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) [REDACTED]
(f) 559.241.6277
Email: kclark@westlandswater.org

-----Original Message-----

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Sent: Friday, September 30, 2016 7:37 AM
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David Bernhardt

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From: Bernhardt, David L.
Sent: Friday, September 30, 2016 9:22 AM
To: 'Karen Clark'
Subject: RE: Ducks unlimited

Thank you!!

-----Original Message-----

From: Karen Clark [<mailto:kclark@westlandswater.org>]
Sent: Friday, September 30, 2016 11:47 AM
To: Bernhardt, David L.
Subject: RE: Ducks unlimited

Hello David,

Yes, 4:30 p m. on October 6 at Tom's office in Sacramento.

~Karen
Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
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From: Johnny Amaral

Sent: Monday, October 3, 2016 9:08 AM

To: David Bernhardt; Dennis Cardoza; Denny Rehberg; Catherine Karen; Ryan A. ' 'Smith

Subject: No call today

Sorry for the short notice, but I had to move my weekly call with the Sacramento team to 10 AM PST. So we need to cancel the D.C. call this week.

Best,

Johnny Amaral

Deputy General Manager - External Affairs

Westlands Water District

From: Denny Rehberg
Sent: Monday, October 3, 2016 9:12 AM
To: Johnny Amaral
CC: David Bernhardt; Dennis Cardoza; Catherine Karen; Ryan A. 'Smith
Subject: Re: No call today

Thanks,

I will be out of the country October 6-18.

On Oct 3, 2016, at 10:08 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

Sorry for the short notice, but I had to move my weekly call with the Sacramento team to 10 AM PST. So we need to cancel the D.C. call this week.

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

.....
Mercury.

Denny Rehberg

Co-Chairman

(US Congressman 2001-2013)

300 Tingey Street SE | Suite 202

Washington, DC | 20003

202.261.4000 office | [REDACTED] mobile

www.mercuryllc.com

From: DCardoza@foley.com
Sent: Monday, October 3, 2016 9:13 AM
To: Johnny Amaral
CC: David Bernhardt; Denny Rehberg; Catherine Karen; Ryan A. ' 'Smith
Subject: Re: No call today

Thanks

Sent from my iPhone

Please excuse any auto correct errors

On Oct 3, 2016, at 12:08 PM, Johnny Amaral <jamaral@westlandswater.org<<mailto:jamaral@westlandswater.org>>> wrote:

Sorry for the short notice, but I had to move my weekly call with the Sacramento team to 10 AM PST. So we need to cancel the D.C. call this week.

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

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From: Bernhardt, David L.
Sent: Monday, October 3, 2016 9:14 AM
To: Johnny Amaral
CC: Dennis Cardoza; Denny Rehberg; Catherine Karen; Smith, Ryan A.
Subject: Re: No call today

Thx

David Bernhardt

On Oct 3, 2016, at 12:08 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

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Best,

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Deputy General Manager - External Affairs
Westlands Water District

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From: Philip Williams
Sent: Thursday, October 6, 2016 2:31 PM
To: Ara Azhderian; Jon Rubin
Subject: FW: Delta conditions report
Attachments: 2016-10-6-DeltaConditionsReport.docx

Don't want to get my finger in your kool-aid, or get the good-idea fairly all fired up, but in Holly's report, it would be helpful to see, under the combined scheduled exports, the split between Jones and Banks.

I appreciate Holly taking the time to put these together, as the information is helpful.

v/r,
phil

From: Holly Long [mailto:holly@mosaicassociates.net]
Sent: Thursday, October 6, 2016 1:28 PM
To: ara.azhderian@sldmwa.org; Carolyn Jensen; Chris White; David Bernhardt; Dennis Cardoza; Frances Brewster (FBrewster@valleywater.org); Frances Mizuno; Jason Nishijima; Jason Peltier (jason.peltier@sldmwa.org); Jon Rubin (Jon.Rubin@sldmwa.org); Judy Bendix; O'Hanlon, Daniel; pwilliams@westlandswater.org; sfong@sfcwa.org; Sheila Greene (sgreene@westlandswater.org); Steve Chedester; Tom Boardman (tboardman@apex.net)
Subject: Delta conditions report

Hi everyone,

The Delta conditions report is attached.

Thank you,
Holly

Holly Long
Mosaic Associates
1690 San Pablo Avenue, Suite D
Pinole, CA 94564
holly@mosaicassociates.net
510.964.0394 office
510.964.0396 fax
[REDACTED] cell

DELTA CONDITIONS REPORT, OCTOBER 6, 2016

Holly Long, SLDMWA

EXECUTIVE SUMMARY

- Operational constraint: Salinity management.
 - X2 today is >81 km (east of Collinsville).
 - Scheduled combined exports today are 7,000 cfs.
 - Outflow index today is ~4,800 cfs.
 - Yesterday's CDEC OMR values were -7,823 cfs (daily), -7,419 cfs (5-day), -8,537 cfs (14-day).
 - % inflow diverted today is 48.8% (3-day average).
- Salvage and ITLs, WY 2017
 - No salvage for listed species yet this water year (as of 10/4).
- Surveys/monitoring
 - **Delta smelt**, most recent surveys:
 - Fall Midwater Trawl: September abundance index=0 (overall FMWT index is sum of September–December indices).
 - **Longfin smelt**, most recent surveys:
 - Fall Midwater Trawl: September abundance index=3 (overall FMWT index is sum of September–December indices).

DELTA CONDITIONS REPORT, OCTOBER 6, 2016

DELTA SMELT

- **Salvage:**

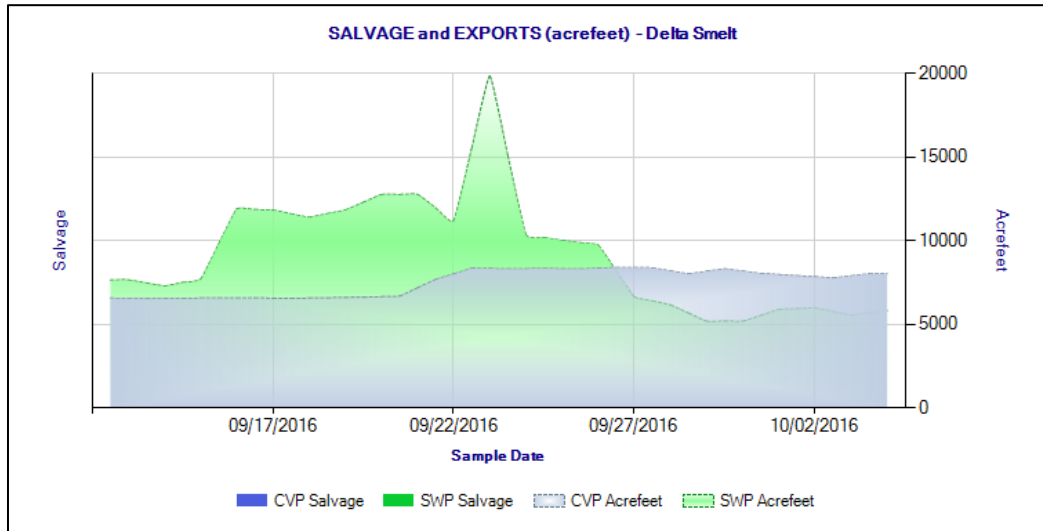


Figure: Recent delta smelt salvage (adults and juveniles) at both facilities (none in time period shown). Data through 10/4.

	Combined salvage as of 10/4/16	Concern level for WY 2017	ITL for WY 2017
Adult	0	Not yet known	
Juvenile	0	Not yet known	

- **Fall Midwater Trawl index:**

- September abundance index=0 (for data table of historical record see <http://www.dfg.ca.gov/delta/data/fmwt/indices.asp>). The annual FMWT index is the sum of September–December abundance indices.

- **Summer Towntet:**
 - The 2016 Summer Towntet index for delta smelt was 0.

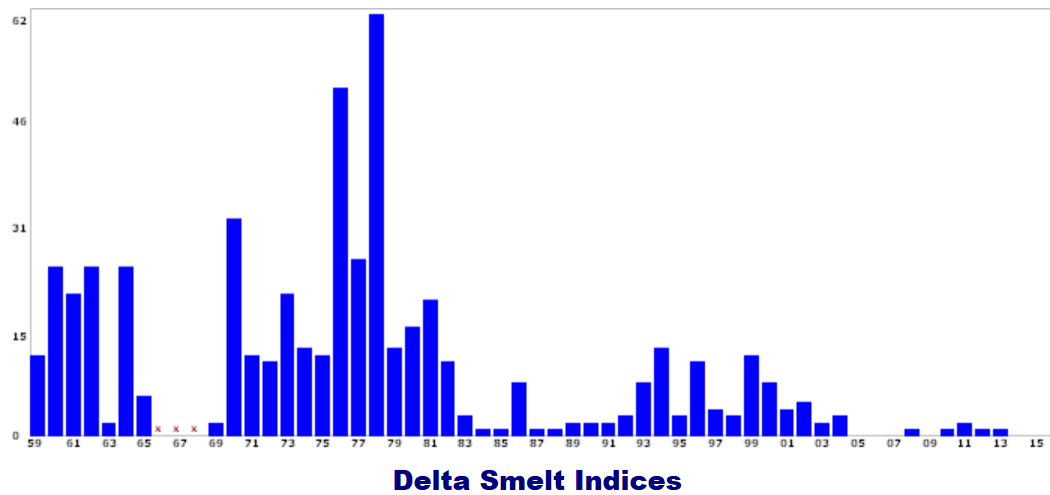


Figure: Summer Towntet indices for delta smelt. Graph from <http://www.dfg.ca.gov/delta/data/towntet/indices.asp?species=3>.

- **Bay Study:**

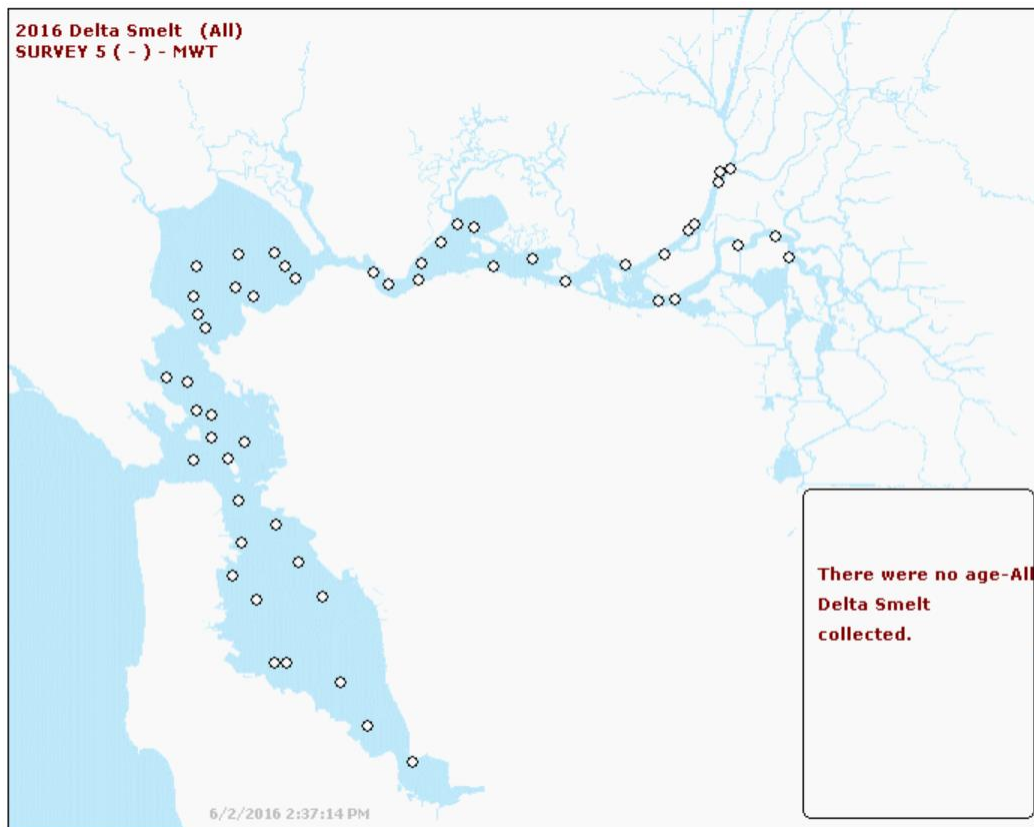


Figure: Monthly Mid water trawl (pelagic), Survey 5 (May; most recent survey available). No delta smelt were caught in May.

LONGFIN SMELT

- **Salvage:**

- No salvage yet this WY (as of 10/4).

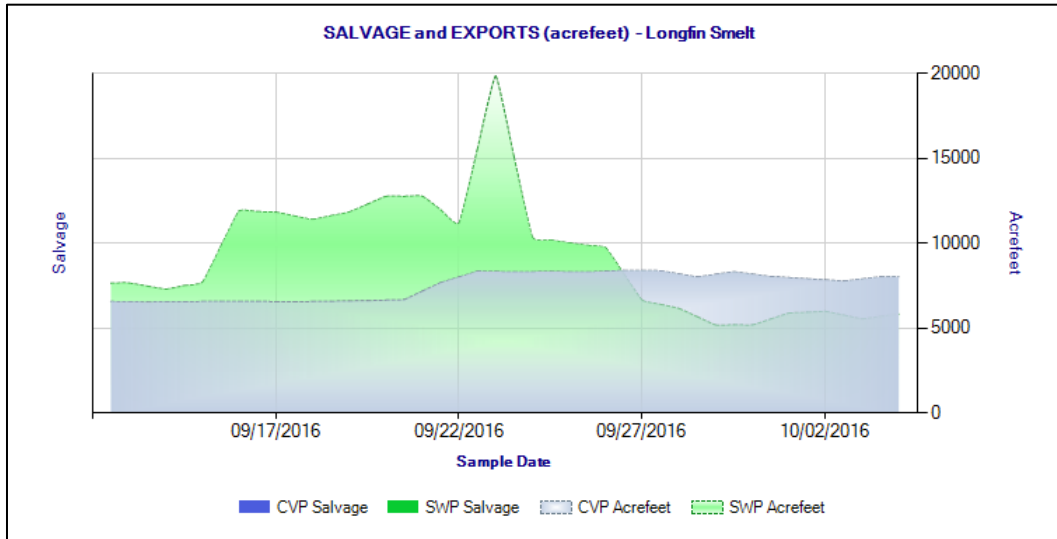


Figure: Recent longfin smelt salvage at both facilities (none in the time frame shown). Data through 10/4.

- **Fall Midwater Trawl index:**

- September abundance index=3 (for data table of historical record see <http://www.dfg.ca.gov/delta/data/fmwt/indices.asp>). The annual FMWT index is the sum of September–December abundance indices.

- **Bay Study:**

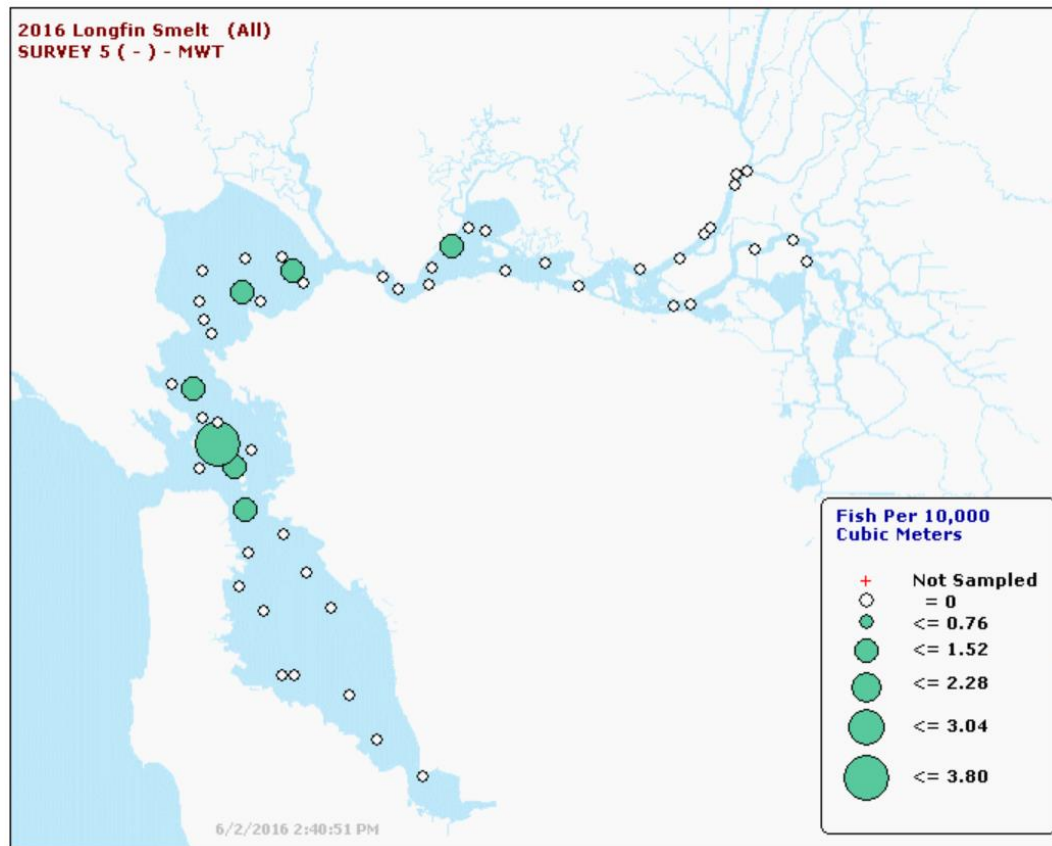


Figure: Monthly Mid water trawl (pelagic), Survey 5 (May). Age-0 longfin smelt were caught in Suisun, San Pablo, and San Francisco Bays.

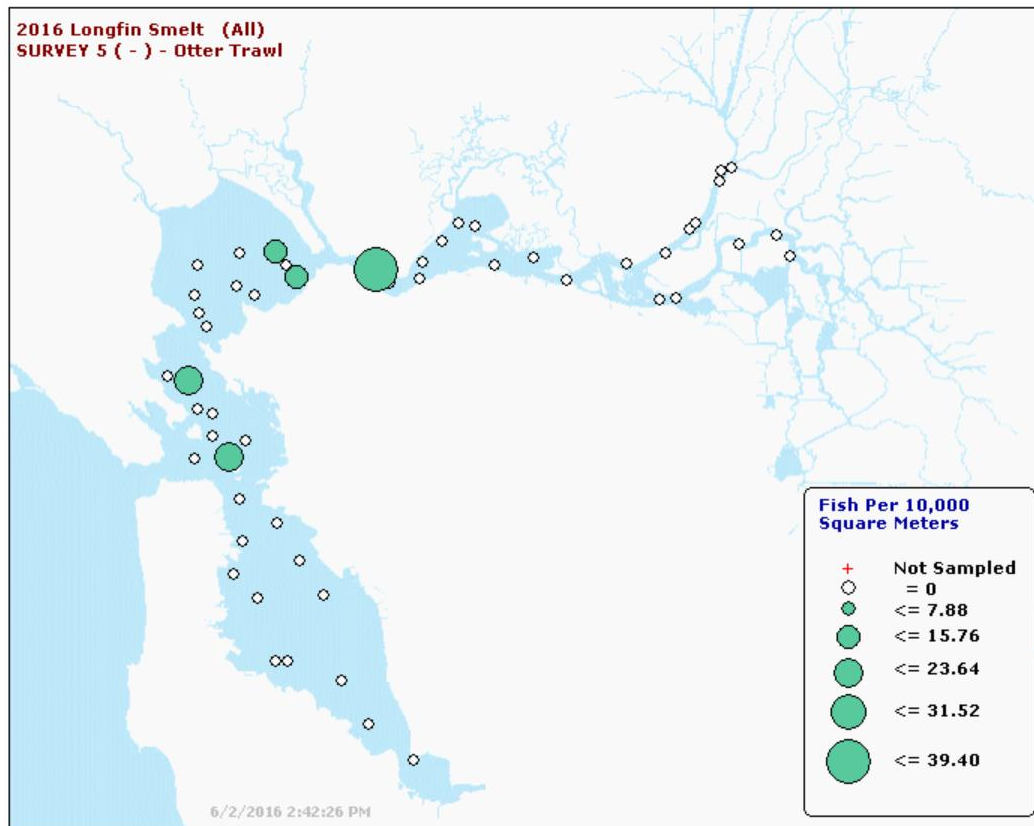


Figure: Monthly otter trawl (demersal/bottom), Survey 5 (May). Age-0 longfin smelt were caught in the Carquinez Strait, eastern San Pablo Bay, and San Francisco Bay.

CHINOOK SALMON

- Salvage:

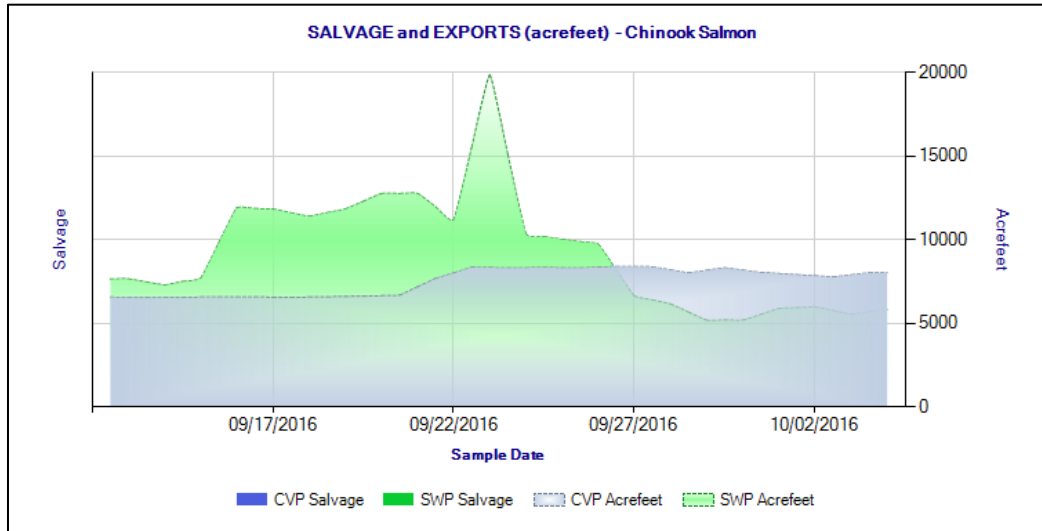


Figure: Recent Chinook salmon salvage at both facilities (all races; none in the time frame shown). Data through 10/4.

	Winter-run cumulative combined loss	Winter-run concern level for WY 2017	Winter-run ITL for WY 2017
Non-clipped (as of 10/4)	0	Not yet known	
Clipped (hatchery fish not yet released)	n/a	Not yet known	

Coleman NFH Late-fall-run surrogate group	Released spring-run surrogates	Cumulative combined loss	Spring-run surrogate concern level WY 2017 (0.5%)	Spring-run surrogate ITL WY 2017 (1%)
No releases yet this water year	n/a	n/a	n/a	n/a

STEELHEAD

- **Salvage:**

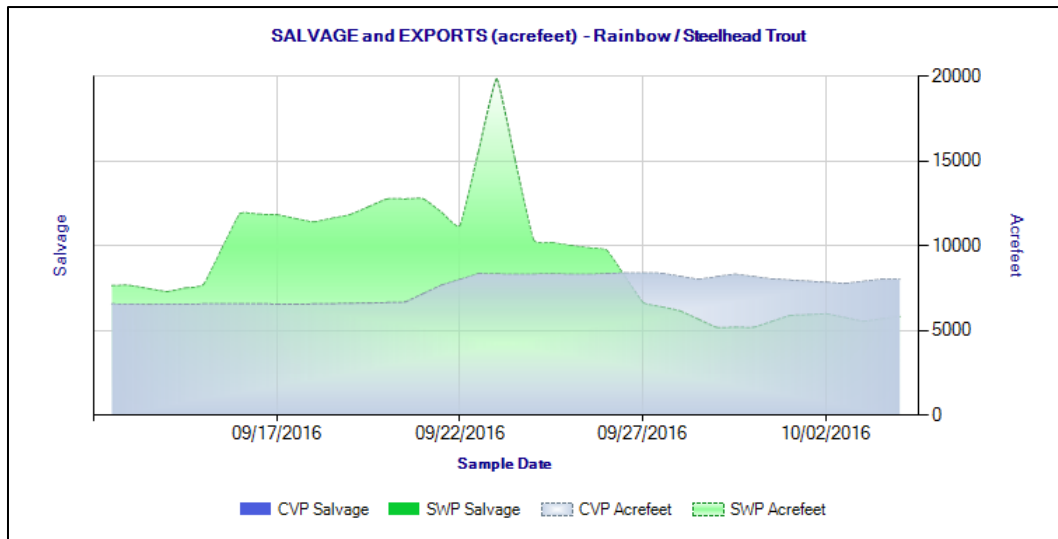
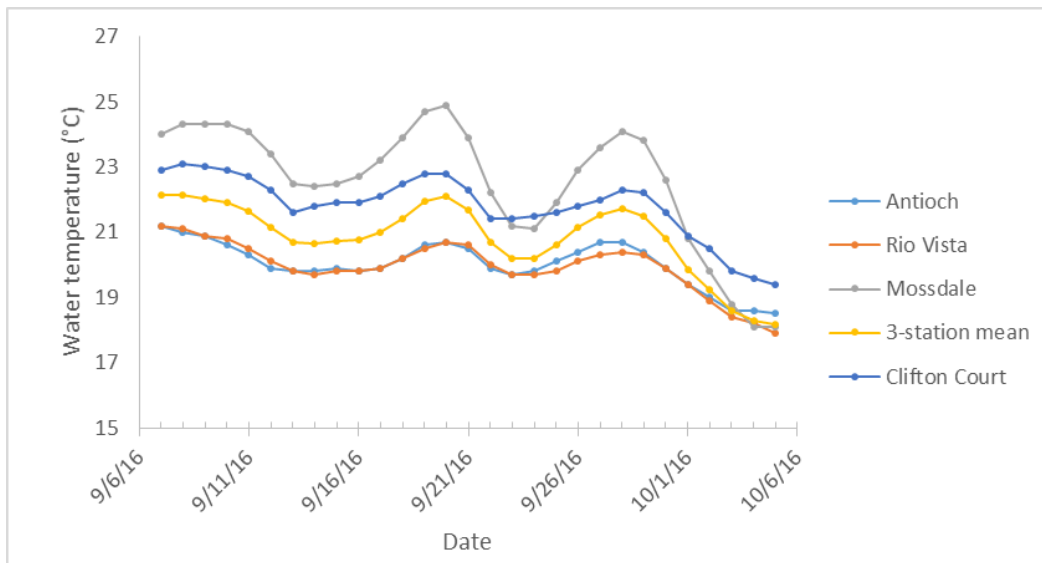


Figure: Recent steelhead salvage at both facilities (clipped and non-clipped; none in time period shown).
Data through 10/4.

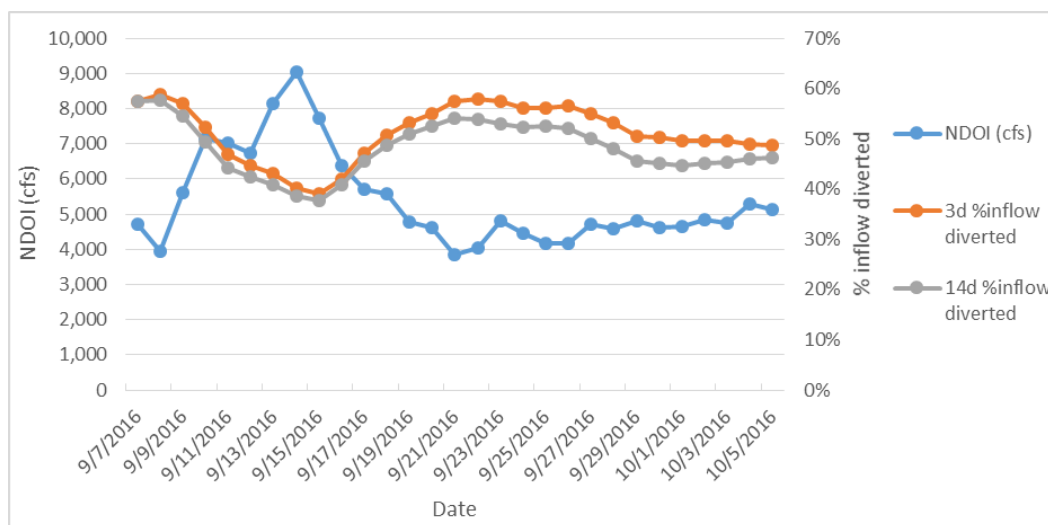
	Cumulative combined salvage for WY 2017 as of 10/4/16	Concern level	Steelhead ITL
Non-clipped, adults and juveniles	0	1,500	3,000

PHYSICAL CONDITIONS

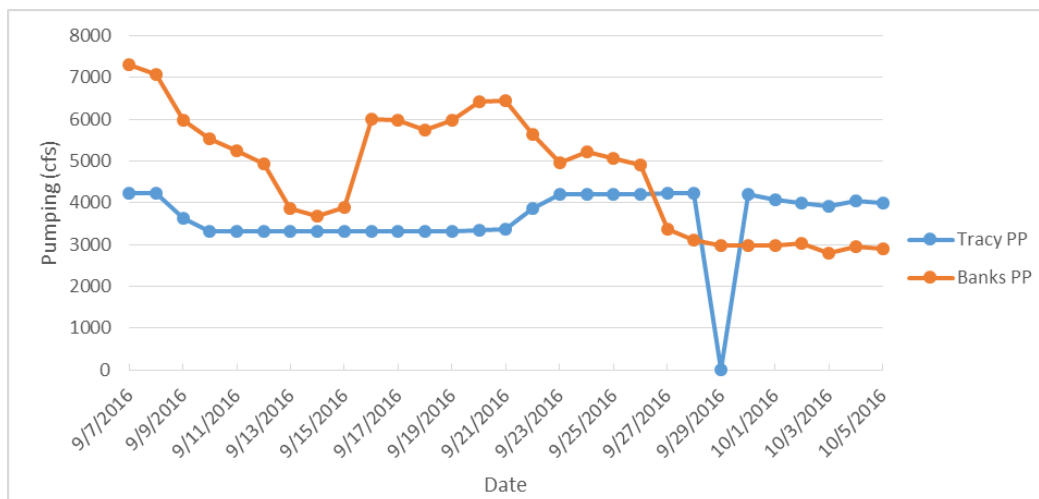
- Currently controlling operations: Salinity management.
- Location of X2, 10/6: >81 km (east of Collinsville).
- DCC status, 10/6: Open.
- Turbidity (at sites in delta smelt BiOp)
 - Three-day mean Prisoner's Point: 4.6 NTU on 10/5
 - Three-day mean Holland Cut: 1.1 NTU on 10/5
 - Three-day mean Victoria Canal: 2.4 NTU on 10/5
- South Delta temporary barriers update: October 3 (Email from Simon Kwan, DWR, 10/3)
 - Fall Head of Old River Barrier closed on September 27.
 - Old River at Tracy barrier flap gates are tidally operating, since 4/1.
 - Middle River barrier flap gates are tidally operating, since 4/1. DWR raised the crest of the barrier by one foot on 6/22 for irrigation demands.
 - Grant Line Canal barrier was fully closed on 6/8. All flap gates operate tidally as of 6/17.
 - Notching of the Middle River and Old River barriers occurred on 9/12.
- Water Supply Index (WSI) forecast: May 1 forecast date (Water Supply Index (WSI) Forecast email, Andrew Reising, DWR, 5/9—last update for WY 2016)
 - 50% exceedance for Sacramento River Unimpaired Runoff WY forecast: 18.6 MAF (102% of average)
 - Forecasted 50% exceedance for Sacramento Valley Index is 7.1 (Below Normal).
 - Forecasted 75% exceedance for San Joaquin Valley Index is 2.4 (Dry).
- Temperature



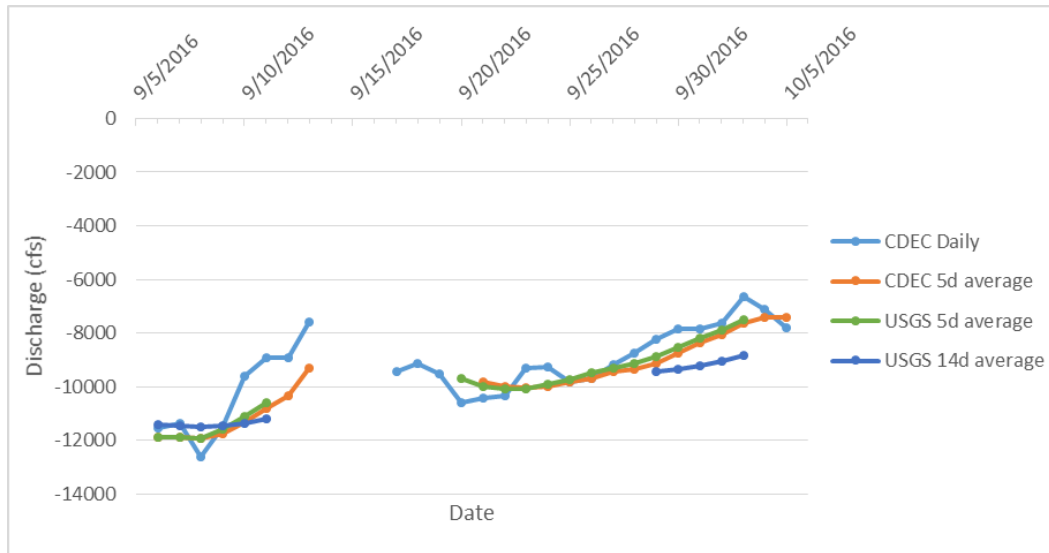
- Delta outflow index as of 10/6: ~4,800 cfs
 - October monthly outflow requirement is 4,000 cfs, with a 7-day average not less than 3,000 cfs. Status as of 10/5 is 4,928 cfs and 4,928 cfs, respectively.
- Total Delta inflow as of 10/6: ~14,042 cfs
 - Sacramento flow: 12,767 cfs
 - San Joaquin flow: 392 cfs
 - % inflow diverted (3-day average): 48.8%.
 - For % inflow diverted, July–January standard is 65%.



- Exports:
 - 10/6 scheduled exports: 3,000 cfs Clifton Court inflow; 4,000 cfs Jones/Tracy PP.



- Tidally-filtered OMR:



REGULATORY

- Delta smelt
 - Current RPAs: n/a.
- Longfin smelt
 - Current RPAs: n/a.
- Salmonids
 - See below for relevant RPAs:

2009 BiOp RPA section	Trigger stage	Trigger month	Trigger criteria	WY 2017 information	Regulation
IV.1.1 (Monitoring and alerts to trigger changes in DCC operations)	"First alert"	Oct. - Apr.	(1) Mean daily flow >95 cfs in Mill or Deer Creek OR (2) Starting in Oct., an increase in tributary flow of > 50% over levels immediately preceding flow spike -> indicates cues for emigration initiation.		Either criterion can trigger the alert. Alert signals that gate operations might need alteration in near future to avoid diverting outmigrating Chinook.
	"Second alert"	.	(1) Water temp < 13.5°C at Knights Landing AND (2) Flows greater than 7,500 cfs at Wilkins Slough--> associated with recovering emigrating Chinook at Knights Landing.		Alert triggered when both second alert criteria met.
IV.1.2 (DCC gate operations)	N/A	Oct. - Nov.	Fish present (criteria based on D1641 WQ standards, Knights Landing Catch Index, and Sacramento Catch Index).		Gates closed if fish present. See 2011 amend., Encl. 2 (p. 62) for details on triggers.
		Dec. 1-14	1) If D-1641 WQ criteria met, DCC gates closed (unless NMFS approves Chinook experiment). 2) If WQ criteria are not met but both KLCI and SCI are <3 fish/d, DCC may be opened until WQ criteria met, then DCC will close within 24 hrs. 3) If WQ criteria are not met but either KLCI or SCI >3 fish/d, DOSS makes recommendation to NMFS and WOMT per Action IV.5 procedures (2011 amendment, Encl. 2 (p. 63)).		Gates closed, dependent on triggers.
		Dec. 15-Jan. 31	Gates may be opened for up to 5 days for NMFS-approved experiment, or for one-time event between Dec. 15-Jan. 5 when needed to maintain WQ in response to high tide coupled with low inflow.		Gates closed, dependent on triggers.
		Feb. - May 20	N/A		Gates closed per D1641.
		May 21 - June 15	N/A		Closed up to 14 days per D1641.
IV.3 (Reduce likelihood of entrainment or salvage at export facilities)	"Third alert"	Nov. - Dec.	Catch index > 10 fish/d from either Knights Landing or Sacramento Catch Index.		In conjunction with two DCC-closure triggers (Action IV.1.1), this alert signals that export operations might need to change in near future due to large numbers juvenile Chinook migrating into upper Delta.
	.		(1) Daily SWP/CVP older juvenile loss density > 8 fish/TAF. (2) Daily loss > 95 fish/d. (3) CNFH CWT late fall-run Chinook or LSNFH CWT winter-run cumulative loss > 0.5%.		When any trigger criterion met, reduce exports to combined 6,000 cfs for 3 days or until CVP/SWP daily density < 8 fish/TAF.
	.		(1) Daily SWP/CVP older juvenile loss density > 15 fish/TAF. (2) Daily loss > 120 fish/d. (3) CNFH CWT LFR or LSNFH CWT WNT cumulative loss > 0.5%.		When any trigger criterion met, reduce exports to combined 4,000 cfs for 3 days or until CVP/SWP daily density < 8 fish/TAF.

From: Ara Azhderian
Sent: Thursday, October 6, 2016 2:36 PM
To: Philip Williams; Jon Rubin
Subject: RE: Delta conditions report

Thanks Phil,

Actually, no wet finger at all! I really appreciate the recommendation. I am meeting with Holly and Tom Boardman in a couple of weeks to discuss other improvement ideas, e.g. a 1st page critical data dashboard, so keep the good ideas coming!

a

From: Philip Williams [mailto:pwilliams@westlandswater.org]
Sent: Thursday, October 6, 2016 2:34 PM
To: Ara Azhderian <ara.azhderian@sldmwa.org>; Jon Rubin <Jon.Rubin@sldmwa.org>
Subject: FW: Delta conditions report

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Holly Long
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1690 San Pablo Avenue, Suite D
Pinole, CA 94564
holly@mosaicassociates.net
510.964.0394 office
510.964.0396 fax
[REDACTED] cell

From: Johnny Amaral
Sent: Friday, October 7, 2016 9:48 AM
To: David Bernhardt
Subject: Forgot to ask you...

Do you still have on file a copy of Sarah Woolf's testimony from when she testified before the Senate ENR committee?

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

From: Bernhardt, David L.
Sent: Friday, October 7, 2016 9:49 AM
To: 'Johnny Amaral'
Subject: RE: Forgot to ask you...

Do you need it in a particular format? For example, word, pdf etc.?

-----Original Message-----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Friday, October 07, 2016 12:48 PM
To: Bernhardt, David L.
Subject: Forgot to ask you...

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Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

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From: Johnny Amaral
Sent: Friday, October 7, 2016 9:52 AM
To: Bernhardt, David L.
Subject: Re: Forgot to ask you...

Word is good

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

> On Oct 7, 2016, at 9:49 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

>

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> Sent: Friday, October 07, 2016 12:48 PM

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> Westlands Water District

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From: Bernhardt, David L.
Sent: Friday, October 7, 2016 9:52 AM
To: 'Johnny Amaral'
Subject: Sarah's Testimony
Attachments: 10 8 15 Woolf Testimony.pdf

Here you go.

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Testimony of Sarah Woolf, Fresno County Farmer
Before the Committee on Energy and Natural Resources
United States Senate
Legislative Hearing on
Western and Alaska Water Legislation
October 8, 2015

Good morning, Chairwoman Murkowski, Ranking Member Cantwell, and members of the Committee. I was honored to be invited to testify before the Committee today, and I am hopeful that my remarks can facilitate progress on the critical legislation you have before you today because entire communities are depending upon you to find a resolution.

I am a second generation farmer. My two brothers and I grow tomatoes, garlic, and onions in Fresno County. My husband, who is here with me today, is also a second generation farmer. While our farms rely on some seasonal employees, many of our employees are long-term employees who have been with us for years. I am testifying today to share my personal perspective, although I am also an elected Member of the Board of Directors of Westlands Water District.

I know that in June, you received testimony from another California farmer, Cannon Michael, who explained the impacts of the water crisis facing California agriculture. At that time he discussed many of the key facts associated with the water challenges facing California farmers, and he explained that:

- 44% of California's 9.6 million acres of irrigated farmland are receiving zero surface water allocations from state, federal, and local irrigation projects, according to the California Farm Water Coalition Agricultural Water Supplies Survey;
- Almost 75% of the state's irrigated farm land, nearly seven million acres, will receive 20% or less of its normal surface water supply; and
- According to the California Department of Water Resources (DWR), 692,000 acres of farmland were fallowed in 2014 because of water shortages.

These are very significant facts for you to consider. However, I also want to bring to your attention the impacts felt by individuals who live and work in the cities and communities without water, people without jobs and business owners recognizing they potentially have no future. The fear and despair in people's eyes today is real, and it is heart wrenching. I know this because I spend a lot of time working in these communities.

These people are Californians, and they are working hard to produce the basic necessities for our country and our world, and of course, for themselves. They work the land while trying to

improve our schools and communities. Many of them have come to our country recently, and others from many generations before, but all with the hope of improving the lives of their families. They want the opportunities that all Americans want, an education and an opportunity for a better life.

If our elected representatives are responsible for anything, it should be to provide the most basic of needs: water, access to schools, and most importantly the ability to work. Without these basic needs, residents of our communities are forced to live in tents made of pallets behind mini marts and stand in food lines on a weekly basis to fulfill those basic needs. We cannot be the land of opportunity while communities lack water and residents are actually showering in church parking lots.

What makes our water situation so disturbing is that many of these negative effects have been imposed on our community, not by Mother Nature, but as the direct result of conscious policy decisions made by federal agency employees who believe they are following the will and direction of Congress. The people of the State of California, which includes my family, have very strong environmental values - and I deeply understand the importance of protecting the environment - but environmental concerns cannot be put above all else, without any regard to the negative impacts that are caused by the policy choices made.

When confronted about these consequences, the administrators of federal agencies claim they are merely exercising their discretion under the law in a way that causes these impacts. The Courts have agreed that they are free to cause these ill wills with your blessing. The Courts have explained:

We recognize the enormous practical implications of this decision. But the consequences were prescribed when Congress determined that “these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” . . . Consequently, any other “[r]esolution of these fundamental policy questions” about the allocation of water resources in California “lies . . . with Congress . . .”

(San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 593 (9th Cir. 2014)).

Ultimately, that is why we need legislation. We need it because the Courts and the federal agencies place the consequences for these decisions at your feet and you actually have the power to address these ills. At the same time, I believe you can direct the agencies to minimize the negative impacts of the decisions on these communities, while still requiring that they be thoughtful about the impacts their actions have on wildlife and other environmental values.

It is important to note that it is unquestionable that California is in the midst of a drought. The hydrology and snowpack in the state is the only evidence you need to understand that. But the impacts of the crisis have been made worse by government decisions, interpretation of the law by fish agencies, and inaction by the Congress. It's undeniable. Lake Shasta has over one million acre-feet more of water stored today than it did during the worst drought in California history of 1977. Consider for a minute that as a result of the 2009 biological opinions that restrict water

pumping in the Delta, over 1.1 TRILLION gallons of water have been flushed to the ocean. And there have been countless other laws and government decisions on the management of California's water resources that have been just as frustrating. That is water that is lost forever, and the impact of that lost water is felt most by cities, communities, business, and farmers across the state. All while the people of the state are being forced to kill off their landscapes, capture shower water, not flush their toilets regularly, and watch their children play Saturday morning soccer on fields that resemble a sheet of sandpaper. In my opinion, the government can't have it both ways. The government cannot make decisions to flush that amount of water, while bemoaning the "drought". Not with a straight face, anyway. Simply put, the people of California are out of water because of decisions made by the people that represent them. And those decisions have resulted in devastating consequences.

From my perspective, both H.R. 2898, the Western Water and American Food Security Act of 2015, and S. 1894, the California Emergency Drought Relief Act of 2015, are efforts to address the problems we are seeing in our communities but they take very different approaches to address the issues we face. Therefore, I am deeply appreciative of your willingness to hold a legislative hearing. I am also optimistic that Members of Congress can bridge their differences between the two bills because absent enactment of legislation that gives more explicit direction to agencies, we will see no relief from the situation we face.

To that end, I want to provide constructive suggestions. Last year, a broad cross-section of local community leaders, such as the mayor of Fresno and growers from all over the Central Valley, came together to provide a unified set of concepts that we believed would be helpful for bridging the differences between last year's bills. I believe these concepts are still applicable to the bills before you today. Therefore, we ask that you:

- Provide congressional direction concerning the operation of the Central Valley Project and the State Water Project to ensure sufficient operational flexibility to restore water supply and water supply reliability. The operators of these projects must be able to capture water from the Delta during periods of higher flows and move water from north to south in a rational way.
- Extend the provisions of any legislation for a period of time that will allow communities to establish sound long term water supplies for their future;
- Establish a process that could lead to increased storage in a reasonable timeframe;
- Ensure that additional burdens are not placed on the State Water Project as a result of congressional action; and
- Recognize that the reasonableness and efficacy of the San Joaquin River Restoration Program must be reevaluated in light of changed conditions since its authorization, including the reality of federal budget constraints.

Both bills address most of these issues, but I believe the House proposal gives better direction to the agencies on how they should operate the projects and is a bill that, unlike the Senate bill,

offers permanent solutions. Nevertheless, we think the differences are surmountable with actual interest in finding a resolution. Again, thank you for the invitation to testify, and I am prepared to answer any questions you have.

From: Johnny Amaral

Sent: Monday, October 10, 2016 7:45 AM

To: David Bernhardt; Dennis Cardoza; Denny Rehberg; Catherine Karen; Ryan A. ' 'Smith

Subject: No call today

I have two conflicts this morning. But I'd like to reschedule the call to Tuesday. Same time.

Best,

Johnny Amaral

Deputy General Manager - External Affairs

Westlands Water District

From: DCardoza@foley.com
Sent: Monday, October 10, 2016 1:34 PM
To: 'Johnny Amaral'
Subject: RE: No call today

Ok I am in for Tuesday.

-----Original Message-----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Monday, October 10, 2016 10:45 AM
To: David Bernhardt; Cardoza, Dennis A.; Denny Rehberg; Catherine Karen; Ryan A. 'Smith'
Subject: No call today

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From: Johnny Amaral

Sent: Monday, October 17, 2016 9:52 AM

To: Ryan A. ' 'Smith; Denny Rehberg; Dennis Cardoza; David Bernhardt; Catherine Karen

Subject: I'm still on the conference call with Hill staff

And it looks like it will likely go longer than 10 more minutes.

So, for the time being, let's delay the morning call until further notice

Best,

Johnny Amaral

Deputy General Manager - External Affairs

Westlands Water District

From: Karen, Catherine
Sent: Monday, October 17, 2016 9:53 AM
To: Johnny Amaral; Ryan A. ' 'Smith; Denny Rehberg; Dennis Cardoza; David Bernhardt
Subject: RE: I'm still on the conference call with Hill staff

Ok

Sent with Good Work (www.blackberry.com)

From: Johnny Amaral <jamara1@westlandswater.org>
Date: Monday, Oct 17, 2016, 12:52 PM
To: Ryan A. ' 'Smith <RSmith@BHFS.com>, Denny Rehberg <drehberg@mercuryllc.com>, Dennis Cardoza <dcardoza@foley.com>, David Bernhardt <dbernhardt@bhfs.com>, Karen, Catherine <ckaren@sidley.com>
Subject: I'm still on the conference call with Hill staff

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So, for the time being, let's delay the morning call until further notice

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

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If you are not the intended recipient, please delete the e-mail and any attachments and notify us immediately.

From: Johnny Amaral
Sent: Monday, October 17, 2016 10:25 AM
To: Karen, Catherine
CC: Ryan A. 'Smith; Denny Rehberg; Dennis Cardoza; David Bernhardt
Subject: Re: I'm still on the conference call with Hill staff

Were done with the conference call. Want to try 10:30 PST ? It will be brief

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

On Oct 17, 2016, at 9:53 AM, Karen, Catherine <ckaren@sidley.com> wrote:

Ok

Sent with Good Work (www.blackberry.com)

From: Johnny Amaral <jamaral@westlandswater.org>
Date: Monday, Oct 17, 2016, 12:52 PM
To: Ryan A. 'Smith <RSmith@BHFS.com>, Denny Rehberg <drehberg@mercuryllc.com>, Dennis Cardoza <dcardoza@foley.com>, David Bernhardt <dbernhardt@bhfs.com>, Karen, Catherine <ckaren@sidley.com>
Subject: I'm still on the conference call with Hill staff

And it looks like it will likely go longer than 10 more minutes.

So, for the time being, let's delay the morning call until further notice

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

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If you are not the intended recipient, please delete the e-mail and any attachments and notify us immediately.

From: Bernhardt, David L.
Sent: Monday, October 17, 2016 10:27 AM
To: 'Johnny Amaral'; Karen, Catherine
CC: Smith, Ryan A.; Denny Rehberg; Dennis Cardoza
Subject: RE: I'm still on the conference call with Hill staff

For what it is worth have a 1:30 call.

David

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Monday, October 17, 2016 1:25 PM
To: Karen, Catherine
Cc: Smith, Ryan A.; Denny Rehberg; Dennis Cardoza; Bernhardt, David L.
Subject: Re: I'm still on the conference call with Hill staff

Were done with the conference call. Want to try 10:30 PST ? It will be brief

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

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Date: Monday, Oct 17, 2016, 12:52 PM
To: Ryan A. 'Smith' <RSmith@BHFS.com>, Denny Rehberg <drehberg@mercuryllc.com>, Dennis Cardoza <dcardoza@foley.com>, David Bernhardt <dbernhardt@bhfs.com>, Karen, Catherine <ckaren@sidley.com>
Subject: I'm still on the conference call with Hill staff

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Johnny Amaral
Deputy General Manager - External Affairs
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From: DCardoza@foley.com
Sent: Monday, October 17, 2016 10:29 AM
To: Johnny Amaral
CC: Karen, Catherine; Ryan A. 'Smith; Denny Rehberg; David Bernhardt
Subject: Re: I'm still on the conference call with Hill staff

I can participate

Sent from my iPhone

Please excuse any auto correct errors

On Oct 17, 2016, at 1:24 PM, Johnny Amaral <jamaral@westlandswater.org<<mailto:jamaral@westlandswater.org>>> wrote:

Were done with the conference call. Want to try 10:30 PST ? It will be brief

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

On Oct 17, 2016, at 9:53 AM, Karen, Catherine <ckaren@sidley.com<<mailto:ckaren@sidley.com>>> wrote:

Ok

Sent with Good Work (www.blackberry.com<https://urldefense.proofpoint.com/v2/url?u=http-3A__www.blackberry.com&d=DQMCaQ&c=Rlm5WhGmPEr8srpDE4r86Q&r=yhMHKvJkYaWoH8bkmjCNM24pCPMnJRMu5cnOh9t0O7w&m=Dii0IF6zVuCi5FHP7zfhpNO-ZJV6HN1U4phpgcC4M9k&s=jl6BDtXMrafoNy1sFyag2MooxMj6RfP2y8TOZJPp2uA&e=>>)

From: Johnny Amaral <jamaral@westlandswater.org<<mailto:jamaral@westlandswater.org>>>
Date: Monday, Oct 17, 2016, 12:52 PM
To: Ryan A. 'Smith <RSmith@BHFS.com<<mailto:RSmith@BHFS.com>>>, Denny Rehberg <drehberg@mercuryllc.com<<mailto:drehberg@mercuryllc.com>>>, Dennis Cardoza <dcardoza@foley.com<<mailto:dcardoza@foley.com>>>, David Bernhardt <dbernhardt@bhfs.com<<mailto:dbernhardt@bhfs.com>>>, Karen, Catherine <ckaren@sidley.com<<mailto:ckaren@sidley.com>>>
Subject: I'm still on the conference call with Hill staff

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Deputy General Manager - External Affairs
Westlands Water District

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From: Karen Clark

Sent: Tuesday, October 18, 2016 3:27 PM

To: 'Alison MacLeod'; 'Carmela McHenry'; 'Carolyn Jensen'; Catherine Karen; Dan Pope; 'David Bernhardt'; Dennis Cardoza; Denny Rehberg; 'Ed Manning'; 'Gayle Holman'; Jennifer Walsh; Johnny Amaral; 'Mike Burns'; Sheila Greene

Subject: Friday's PR/Legislation Conference Call

All,

Tom will be on vacation so we will not have a PR/Legislation conference call this week. We'll resume the call next week.

Thanks!

~Karen

Karen Clark

Executive Assistant to Thomas W. Birmingham

Westlands Water District

P.O. Box 6056

Fresno, CA 93703

(c) [REDACTED]

(f) 559.241.6277

Email: kclark@westlandswater.org

From: Johnny Amaral
Sent: Thursday, October 20, 2016 8:10 AM
To: David Bernhardt
Subject: Just double checking

Did you connect with the other agency lobbyists about the joint meeting in DC on the 16th?

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

From: Bernhardt, David L.
Sent: Thursday, October 20, 2016 8:11 AM
To: Johnny Amaral
Subject: Re: Just double checking

Talking to them this pm

David Bernhardt

> On Oct 20, 2016, at 10:09 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:
>
>
> Did you connect with the other agency lobbyists about the joint meeting in DC on the 16th?
>
> Best,
>
> Johnny Amaral
> Deputy General Manager - External Affairs
> Westlands Water District
>
>

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From: Johnny Amaral
Sent: Thursday, October 20, 2016 8:27 AM
To: Bernhardt, David L.
Subject: Re: Just double checking

Thank you

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

> On Oct 20, 2016, at 8:11 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

>

> Talking to them this pm

>

> David Bernhardt

>

>

>> On Oct 20, 2016, at 10:09 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>>

>>

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>>

>> Best,

>>

>> Johnny Amaral

>> Deputy General Manager - External Affairs

>> Westlands Water District

>>

>>

>

>

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From: Bernhardt, David L.
Sent: Monday, October 24, 2016 4:45 AM
To: 'Johnny Amaral'
Subject: Meeting on the 16th

Johnny: We need to visit about the proposed meeting on the 16th, when you have a chance today.

Thanks,
David

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From: Johnny Amaral
Sent: Monday, October 24, 2016 6:15 AM
To: Bernhardt, David L.
Subject: Re: Meeting on the 16th

Is 8am PST ok?

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

On Oct 24, 2016, at 4:45 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

Johnny: We need to visit about the proposed meeting on the 16th, when you have a chance today.

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From: Bernhardt, David L.
Sent: Monday, October 24, 2016 6:15 AM
To: 'Johnny Amaral'
Subject: RE: Meeting on the 16th

Of Course, [REDACTED]

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Monday, October 24, 2016 9:15 AM
To: Bernhardt, David L.
Subject: Re: Meeting on the 16th

Is 8am PST ok?

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

On Oct 24, 2016, at 4:45 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

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David

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From: Johnny Amaral
Sent: Monday, October 24, 2016 8:12 AM
To: Bernhardt, David L.
Subject: Re: Meeting on the 16th

It will have to be closer to 830.

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

On Oct 24, 2016, at 6:15 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

Of Course, [REDACTED]

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Deputy General Manager - External Affairs
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From: Noles, Holly A. on behalf of Bernhardt, David L. [DBernhardt@BHFS.com]
Sent: Monday, October 24, 2016 8:16 AM
To: 'Johnny Amaral'
Subject: RE: Meeting on the 16th

Hi Johnny-

David has a call at 8:30AM pacific. He will be free at 9AM if you would like to try then? Thank you.

-Holly

Holly Noles

Executive Assistant

Brownstein Hyatt Farber Schreck, LLP

1155 F Street N.W., Suite 1200

Washington, DC 20004

202.652.2352 tel

HNOLES@bhfs.com

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Monday, October 24, 2016 11:12 AM
To: Bernhardt, David L.
Subject: Re: Meeting on the 16th

It will have to be closer to 830.

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

On Oct 24, 2016, at 6:15 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

Of Course, [REDACTED]

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Monday, October 24, 2016 9:15 AM
To: Bernhardt, David L.
Subject: Re: Meeting on the 16th

Is 8am PST ok?

Best,

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Deputy General Manager - External Affairs
Westlands Water District

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Thanks,
David

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From: Johnny Amaral
Sent: Monday, October 24, 2016 8:31 AM
To: Bernhardt, David L.
Subject: Re: Meeting on the 16th

Ok. Will do

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

On Oct 24, 2016, at 8:15 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

Hi Johnny-

David has a call at 8:30AM pacific. He will be free at 9AM if you would like to try then? Thank you.

-Holly

Holly Noles

Executive Assistant
Brownstein Hyatt Farber Schreck, LLP
1155 F Street N.W., Suite 1200
Washington, DC 20004
202.652.2352 tel
HNOLES@bhfs.com

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Monday, October 24, 2016 11:12 AM
To: Bernhardt, David L.
Subject: Re: Meeting on the 16th

It will have to be closer to 830.

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Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

On Oct 24, 2016, at 6:15 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

Of Course, [REDACTED]

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Monday, October 24, 2016 9:15 AM
To: Bernhardt, David L.
Subject: Re: Meeting on the 16th

Is 8am PST ok?

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Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

On Oct 24, 2016, at 4:45 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

Johnny: We need to visit about the proposed meeting on the 16th, when you have a chance today.

Thanks,
David

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From: Johnny Amaral

Sent: Tuesday, October 25, 2016 8:52 AM

To: David Bernhardt

Subject: did you talk to Watts?

From: Bernhardt, David L.
Sent: Tuesday, October 25, 2016 8:55 AM
To: Johnny Amaral
Subject: Re: did you talk to Watts?

Yes.

David Bernhardt

On Oct 25, 2016, at 11:52 AM, Johnny Amaral <jamaryl@westlandswater.org> wrote:

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From: Johnny Amaral
Sent: Tuesday, October 25, 2016 8:55 AM
To: 'Bernhardt, David L.'
Subject: RE: did you talk to Watts?

Call me at your convenience. 559-241-6238

From: Bernhardt, David L. [mailto:DBernhardt@BHFS.com]
Sent: Tuesday, October 25, 2016 8:55 AM
To: Johnny Amaral <jamaral@westlandswater.org>
Subject: Re: did you talk to Watts?

Yes.

David Bernhardt

On Oct 25, 2016, at 11:52 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

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From: Johnny Amaral

Sent: Monday, November 7, 2016 11:44 AM

To: David Bernhardt; Dennis Cardoza; Catherine Karen; 'Smith, Ryan A.'; Denny Rehberg

Subject: Post mortem

Wednesday, November 9

12:00pm PST

Call in. [REDACTED]

Pass code [REDACTED]

From: Denny Rehberg
Sent: Monday, November 7, 2016 12:13 PM
To: Johnny Amaral
CC: David Bernhardt; Dennis Cardoza; Catherine Karen; Smith, Ryan A.
Subject: Re: Post mortem

Any chance we can make it 12:30 PST? My flight lands at 12:59 MST. If not I can get a report.

On Nov 7, 2016, at 11:43 AM, Johnny Amaral <jamara1@westlandswater.org> wrote:

Wednesday, November 9

12:00pm PST

Call in. [REDACTED]
Pass code [REDACTED]

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From: Johnny Amaral

Sent: Tuesday, November 8, 2016 9:43 AM

To: rpatterson@mwdh2o.com; 'Brent Walthall'; Dan Vink; 'Jason R. Phillips'; dorth@davidorthconsulting.com; Tom Birmingham; 'Shelley Ostrowski'; Steve Chedester; Jeff Sutton; Jason Peltier

CC: David Bernhardt; Dennis Cardoza; 'Joe Raeder'; 'Nancy E Williams'; Hiltcher,Brad L

Subject: DC next week

Gang,

I had dinner last night with Phillips and Chedester in Sacramento and we briefly discussed scheduling items for next week. Aside from the 5pm meeting on Wednesday in Leader McCarthys office, things are a bit fluid.

But, we discussed having a pre-planning meeting before the big show in Kevins office. So, given that Orth is arriving on the red eye at 7 am on Wednesday, lets meet for the pre planning meeting in the Longworth Cafeteria at 12:30 on Wednesday. Please make sure to keep that time frame clear.

After today, we can work on plugging in any other meetings that need to be scheduled. As some of you know, there are a few irons on the fire that we expect to work out in the next 48 hours, including meetings both the House and Senate side.

Stay tuned....as soon as I know anything, I will share it immediately. And if you can, please share with the people on this email any questions, comments, info, or input you have about next weeks trip.

Johnny

From: DCardoza@foley.com

Sent: Wednesday, November 9, 2016 1:05 PM

To: jamaral@westlandswater.org; Bernhardt David Longly; Karen Catherine

Subject: On the call

Are we still on?

Sent from my iPhone

Please excuse any auto correct errors

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From: Ian Lyle, National Water Resources Association
Sent: Wednesday, November 9, 2016 5:36 PM
To: jamaral@westlandswater.org
Subject: NWRA Federal Affairs Alert: 2016 Election Overview and Implications for Water



National Water Resources Association

November 9, 2016

MEMO

To: Federal Affairs Committee
From: Ian Lyle, Director of Federal Affairs
RE: 2016 Election Overview and Implications for Water Policy

Federal Affairs Committee,

As you know Donald Trump has been elected as the 45th President of the United States. In addition, republicans have held onto the majority in both the Senate and the House of Representatives. Setting up republican control of both the legislative and executive branch for the first time since the 109th Congress (2005-2006).

Below we break down the election results and what it could mean for water users over the next few years. It needs to be said that some of this information, especially about potential political appointees, is based on speculation at this point. However, we can give you an idea about some of the individuals that are in play and also provide some perspective on what to expect in the world of water policy over the next few years.

We will go into more detail on each of these topics and begin planning for the next congress at the NWRA Annual conference next week. Confirmed speakers on our Inside Washington panel include David Bernhardt, lead of the Trump Interior transition team. As always, and with your assistance, NWRA is dedicated to ensuring that water issues are seen as a national priority.

President:

Donald Trump will be the next President of the United States by surpassing the 270 Electoral College votes necessary to become President. President Elect Trump has locked up 279 Electoral College votes to Hillary Clinton's 228 Electoral College votes.

Positions on Water Policy:

During the campaign President Elect Trump weighed in on infrastructure including the following points relating to water policy.

- **Regulatory Reform:** would eliminate the "Waters of the United States" rule and the Clean Power Plan; more generally, would link increased investments with positive reforms to infrastructure programs that reduce waste and cut costs; and
- **Municipal Water Investment:** would develop a long-term water infrastructure plan with city, state, and federal leaders to upgrade aging water systems; would support tripling funding for state revolving loan fund programs to help states and local governments upgrade critical drinking water and wastewater infrastructure.- If we look at the FY2017 EPA Budget request this would bring Clean Water and Drinking Water State Revolving Funds from \$2 billion up to \$6 billion. If based off of FY 2016 enacted levels it would bring funding from \$2.257 billion up to \$ 6.77 billion.

NWRA will work to ensure that water for both agricultural and municipal purposes is a priority for the Trump Administration. We will also work to ensure that the Administration has an appreciation and understanding of the importance of western water and the Bureau of Reclamation.

Interior Secretary:

Jan Brewer (former Governor of Arizona)
Mary Fallin (current Governor of Oklahoma)
Robert Grady (former H.W. Bush White House official and venture capitalist)
Harold Hamm (Oklahoma businessman in oil)
Forrest Lucas (Indiana businessman co-founder, Lucas Oil)
Cynthia Lummis (retiring member of the House of Representatives for Wyoming)
Butch Otter (current Governor of Idaho)
Sarah Palin (former Alaska Governor)
Donald Trump Jr. (sportsman and son of Donald Trump)

Agriculture Secretary:

There are more than 70 individuals on the Trump agricultural advisory committee various media reports have floated the following as possible top contenders:

Sam Brownback (Governor of Kansas)
Chuck Connor (CEO National Council of Farmer Cooperatives)
Dave Heineman (Governor of Nebraska)
Ted McKinnely (Director Indiana Department of Ag)
Sonny Perdue (Former Governor of Georgia)
Rick Perry (former Governor of Texas)
Don Villwock (President Indiana Farm Bureau)

Environmental Protection Agency:

Joe Aiello (Director New Jersey Department of Environment)
Carol Comer (Commissioner Indiana Dept. of Environmental Management)
Myron Ebell (Competitive Enterprise institute)
Robert Grady (former H.W. Bush White House official and venture capitalist)
Leslie Rutledge (Arkansas Attorney)

Supreme Court:

President Elect Trump will fill at least one Supreme Court slot, that of former Justice Antonin Scalia. However, he could be positioned to fill multiple slots over the next four years. Justice

Ruth Bader Ginsburg is 83, Justice Anthony Kennedy is 80 and Justice Stephen G. Breyer is 78.

The Trump campaign has released several lists naming a total of 21 individuals that could serve on the court under in his administration. Mr. Trump has indicated that this list will serve as "a guide" that he would consider when making a selection, indicating that the next Justice isn't guaranteed to come from this list. Names on the list include 20 judges and one Senator.

Potential Supreme Court Justices: Keith Blackwell, Charles Canady, Steven Colloton, Alison Eid, Neil Gorsuch, Raymond Gruender, Thomas Hardiman, Raymond Kethledge, Joan Larsen, Mike Lee (Senator from UT has said he is not interested), Thomas Lee, Edward Mansfield, Federico Moreno, William Pryor, Margaret A. Ryan, Amul Thapar, Timothy Tymkovich, David Stras, Diane Sykes, Don Willett and Robert Young.

Senate:

Republicans maintain control of the Senate by holding 51 seats at current count. Democrats saw a small gain, picking up a seat in Illinois where Democrat Tammy Duckworth defeated incumbent Republican Senator Mark Kirk. Democrats are currently slated to hold 47 seats (including two independents that caucus with the democrats) next year. Democrats could also pick up another Senate seat in New Hampshire where Democrat Maggie Hassan is currently leading incumbent republican Senator Kelly Ayotte. There is a 1,000-vote difference in this race and, while Hassan has claimed victory, Ayotte has not conceded the race and has until Monday to file for a recount.

Republicans are expected to pick up one more Senate seat in Louisiana where a runoff election will take place on December 10th. Regardless, republicans will keep the majority in the Senate but with a diminished majority, down from the 54 seats they held in the 114th Congress.

We do not expect any major shifts in leadership in the Senate in the 115th Congress with the exception of the Environment and Public Works Committee (EPW). Current Committee Chairman Jim Inhofe will term out as Chair at the end of the year and Ranking Member Barbara Boxer is retiring at the end of this Congress. The most likely candidate to take the EPW gavel is Wyoming Senator John Barrasso.

The EPW picture on the democrat side for ranking member is less clear. The three most senior democrats on the EPW Committee currently serve as the ranking member on other committees. Senator Tom Carper of Delaware is ranking on the Homeland Security Committee. Senator Ben Cardin of Maryland is the ranking member on the Foreign Relations Committee. Senator Bernie Sanders sits as the ranking member on the Senate Budget Committee. It is not anticipated that Carper, Cardin or Sanders will give up their current positions to take over the helm at EPW for democrats. This leaves Senator Sheldon Whitehouse of Rhode Island as the next inline to serve as the EPW Committee's lead democrat.

House:

Republicans will maintain the majority in the 115th Congress but are down from the current majority of 247 seats to a new total of 239 (need 218 to hold the majority). As of today, democrats are set to hold 193 seats in the House next year. They picked up seats in Florida, including a defeat of former Transportation and Infrastructure Chairman John Mica, as well as Nevada's 4th Congressional district where Rubin Kihuen defeated republican incumbent Crescent Hardy.

The biggest change in House Committee leadership next year will be seen at the Energy and Commerce Committee. Chairman Fred Upton terms out and there are multiple members interested in taking the gavel. Leading contenders include Congressman Greg Walden of Oregon, Congressman John Shimkus of Illinois, and former committee chairman Joe Barton of Texas.

Next Steps:

We will be wading into all of these issues next week and laying the groundwork to ensure that water users have a seat at the table in the 115th Congress. We hope that you will be able to join us for these discussions. If you are unable to join us in person but would still like to provide input or get additional information please feel free to reach out to NWRA staff.

Election Fact:

Did you know farmers are the reason that the election is held on a Tuesday in November? Read about it [HERE](#).

Stay Connected



National Water Resources Association
4 E Street SE
Washington, DC 20003
www.nwra.org

National Water Resources Association, 4 E Street SE, Washington, DC 20003

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Sent by ilyle@nwra.org

From: Johnny Amaral

Sent: Thursday, November 10, 2016 11:47 AM

To: rpatterson@mwdh2o.com; 'Brent Walthall'; Dan Vink; 'Jason R. Phillips'; dorth@davidorthconsulting.com; Tom Birmingham; 'Shelley Ostrowski'; Steve Chedester; Jeff Sutton; Jason Peltier

CC: David Bernhardt; Dennis Cardoza; 'Joe Raeder'; 'Nancy E Williams'; Hiltscher,Brad L

Subject: RE: DC next week

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From: Johnny Amaral [mailto:jamaral@westlandswater.org]

Sent: Tuesday, November 8, 2016 8:43 AM

To: rpatterson@mwdh2o.com; 'Brent Walthall'; Dan Vink (dvink@svwater.org); 'Jason R. Phillips'; dorth@davidorthconsulting.com; Tom Birmingham (tbirmingham@westlandswater.org); 'Shelley Ostrowski'; Steve Chedester (schedester@sjrecwa.net); Jeff Sutton (jsutton

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From: Shelley Ostrowski
Sent: Thursday, November 10, 2016 11:49 AM
To: 'Johnny Amaral'
Subject: RE: DC next week

I'm not available. Any time other than 12-2:45 ish works for me. But, as I'm not essential for this call- I can just follow up with you and Tom in D.C.

Shelley Ostrowski, Esq.
Westlands Water District
Office: 916-321-4225

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Sent: Thursday, November 10, 2016 10:47 AM
To: rpatterson@mwdh2o.com; 'Brent Walthall'; Dan Vink; 'Jason R. Phillips'; dorth@davidorthconsulting.com; Tom Birmingham; 'Shelley Ostrowski'; Steve Chedester; Jeff Sutton; Jason Peltier
Cc: David Bernhardt; Dennis Cardoza; 'Joe Raeder'; 'Nancy E Williams'; Hiltscher,Brad L
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Sent: Thursday, November 10, 2016 11:49 AM

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CC: David Bernhardt; Dennis Cardoza; 'Joe Raeder'; 'Nancy E Williams'; Hiltscher,Brad L

Subject: Re: DC next week

Works for me.

Sent from my BlackBerry 10 smartphone.

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To: rpatterson@mwdh2o.com; 'Brent Walthall'; Dan Vink; 'Jason R. Phillips'; dorth@davidorthconsulting.com; Tom Birmingham; 'Shelley Ostrowski'; Steve Chedester; Jeff Sutton; Jason Peltier

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Sent: Thursday, November 10, 2016 11:50 AM

To: DCardoza@foley.com

CC: rpatterson@mwdh2o.com; 'Brent Walthall'; 'Dan Vink'; 'Jason R. Phillips'; dorth@davidorthconsulting.com; 'Tom Birmingham'; 'Shelley Ostrowski'; 'Steve Chedester'; 'Jeff Sutton'; 'Jason Peltier'; 'David Bernhardt'; 'Joe Raeder'; 'Nancy E Williams'; 'Hiltscher,Brad L'

Subject: RE: DC next week

Yes. 2pm PST, 5PM EST. Sorry for not clarifying

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From: Dan Vink

Sent: Thursday, November 10, 2016 12:11 PM

To: jamaral@westlandswater.org

CC: rpatterson@mwdh2o.com; Brent Walthall; Jason R. Phillips; dorth@davidorthconsulting.com; Tom Birmingham; Shelley Ostrowski; Steve Chedester; Jeff Sutton; Jason Peltier; David Bernhardt; Dennis Cardoza; Joe Raeder; Nancy E Williams; Hiltcher,Brad L

Subject: Re: DC next week

I can make that work

Dan Vink
Executive Director
South Valley Water Association

dvink@svwater.org



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From: Jason Peltier
Sent: Thursday, November 10, 2016 12:30 PM
To: Johnny Amaral
Subject: Re: DC next week

Available. Good move.

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From: Joe Raeder

Sent: Thursday, November 10, 2016 12:46 PM

To: Johnny Amaral; DCardoza@foley.com

CC: rpatterson@mwdh2o.com; 'Brent Walthall'; 'Dan Vink'; 'Jason R. Phillips'; dorth@davidorthconsulting.com; 'Tom Birmingham'; 'Shelley Ostrowski'; 'Steve Chedester'; 'Jeff Sutton'; 'Jason Peltier'; 'David Bernhardt'; 'Nancy E Williams'; 'Hiltscher,Brad L'

Subject: RE: DC next week

Works for me

Joe Raeder

THE FERGUSON GROUP

Office: 202-331-8500

Cell: 202-■■■■-■■■■

----- Original message -----

From: Johnny Amaral <jamaral@westlandswater.org>

Date: 11/10/16 1:49 PM (GMT-05:00)

To: DCardoza@foley.com

Cc: rpatterson@mwdh2o.com, 'Brent Walthall' <bwaltall@kcwa.com>, 'Dan Vink' <dvink@svwater.org>, "'Jason R. Phillips'" <jphillips@friantwater.org>, dorth@davidorthconsulting.com, 'Tom Birmingham' <tbirmingham@westlandswater.org>, 'Shelley Ostrowski' <sostrowski@westlandswater.org>, 'Steve Chedester' <schedester@sjrecwa.net>, 'Jeff Sutton' <jsutton@tccanal.com>, 'Jason Peltier' <jason.peltier@sldmwa.org>, 'David Bernhardt' <dbernhardt@bhfs.com>, Joe Raeder <JRaeder@tfgnet.com>, 'Nancy E Williams' <nwilliams@swaconsult.com>, "'Hiltscher,Brad L'" <bhiltscher@mwdh2o.com>

Subject: RE: DC next week

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--
BEGIN-ANTISPAM-VOTING-LINKS

Teach CanIt if this mail (ID 01S6iN29Q) is spam:

Spam: <https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=aafd87370542&t=20161110&c=s>

Fraud/Phish: <https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=aafd87370542&t=20161110&c=p>

Not spam: <https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=aafd87370542&t=20161110&c=n>

Forget vote: <https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=aafd87370542&t=20161110&c=f>

END-ANTISPAM-VOTING-LINKS

From: Walthall, Brent

Sent: Thursday, November 10, 2016 1:28 PM

To: Johnny Amaral

CC: rpatterson@mwdh2o.com; Dan Vink; Jason R. Phillips; dorth@davidorthconsulting.com; Tom Birmingham; Shelley Ostrowski; Steve Chedester; Jeff Sutton; Jason Peltier; David Bernhardt; Dennis Cardoza; Joe Raeder; Nancy Williams; Hiltsher,Brad L

Subject: Re: DC next week

Works for me

Thank you Johnny
Brent

On Nov 10, 2016, at 10:46 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

Gang,

I'm emailing to check your availability to have a conference call to discuss the new lay of the land given the new developments this week. I've had several conversations with House members and Congressional staff since Tuesday, and I'm sure many of you have as well. Needless to say, there are a lot of ideas and thoughts being kicked around among the delegation.

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Please let me know if you are available for a call around 2pm on Friday afternoon.

Once the call gets scheduled, I will send out call in info.

Johnny

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]

Sent: Tuesday, November 8, 2016 8:43 AM

To: rpatterson@mwdh2o.com; 'Brent Walthall'; Dan Vink (dvink@svwater.org); 'Jason R. Phillips'; dorth@davidorthconsulting.com; Tom Birmingham (tbirmingham@westlandswater.org); 'Shelley Ostrowski'; Steve Chedester (schedester@sjrecwa.net); Jeff Sutton (jsutton

Cc: David Bernhardt; Dennis Cardoza; 'Joe Raeder'; 'Nancy E Williams'; Hiltsher,Brad L (bhiltsher@mwdh2o.com)

Subject: DC next week

Gang,

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Johnny

From: Steve Chedester

Sent: Thursday, November 10, 2016 1:39 PM

To: Johnny Amaral

CC: rpatterson@mwdh2o.com; Brent Walthall; Dan Vink; Jason R. Phillips; dorth@davidorthconsulting.com; Tom Birmingham; Shelley Ostrowski; Jeff Sutton; Jason Peltier; David Bernhardt; Dennis Cardoza; Joe Raeder; Nancy E Williams; Hiltcher,Brad L

Subject: Re: DC next week

I am available for a call on Friday at 2:00 pm

Steve Chedester

SJRECWA

Sent from iPhone

On Nov 10, 2016, at 10:46 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

Gang,

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Sent: Tuesday, November 8, 2016 8:43 AM

To: rpatterson@mwdh2o.com; 'Brent Walthall'; Dan Vink (dvink@svwater.org); 'Jason R. Phillips'; dorth@davidorthconsulting.com; Tom Birmingham (tbirmingham@westlandswater.org); 'Shelley Ostrowski'; Steve Chedester (schedester@sjrecwa.net); Jeff Sutton (jsutton@westlandswater.org)

Cc: David Bernhardt; Dennis Cardoza; 'Joe Raeder'; 'Nancy E Williams'; Hiltcher,Brad L (bhiltcher@mwdh2o.com)

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Johnny

From: Patterson,Roger K

Sent: Thursday, November 10, 2016 2:03 PM

To: Joe Raeder

CC: Johnny Amaral; DCardoza@foley.com; Brent Walthall; Dan Vink; Jason R. Phillips; dorth@davidorthconsulting.com; Tom Birmingham; Shelley Ostrowski; Steve Chedester; Jeff Sutton; Jason Peltier; David Bernhardt; Nancy E Williams; Hiltcher,Brad L

Subject: Re: DC next week

I can do that. Thx.

> On Nov 10, 2016, at 11:46 AM, Joe Raeder <JRaeder@tfgnet.com> wrote:

>

> Works for me

>

>

>

> Joe Raeder

> THE FERGUSON GROUP

> Office: 202-331-8500

> Cell: 202-████-████

>

>

>

>

> ----- Original message -----

> From: Johnny Amaral <jamaral@westlandswater.org>

> Date: 11/10/16 1:49 PM (GMT-05:00)

> To: DCardoza@foley.com

> Cc: rpatterson@mwdh2o.com, 'Brent Walthall' <bwaltall@kcwa.com>, 'Dan Vink' <dvink@svwater.org>, "'Jason R. Phillips'" <jphillips@friantwater.org>, dorth@davidorthconsulting.com, 'Tom Birmingham' <tbirmingham@westlandswater.org>, 'Shelley Ostrowski' <sostrowski@westlandswater.org>, 'Steve Chedester' <schedester@sjrecwa.net>, 'Jeff Sutton' <jsutton@tccanal.com>, 'Jason Peltier' <jason.peltier@sldmwa.org>, 'David Bernhardt' <dbernhardt@bhfs.com>, Joe Raeder <JRaeder@tfgnet.com>, 'Nancy E Williams' <nwilliams@swaconsult.com>, "'Hiltcher,Brad L'" <bhiltcher@mwdh2o.com>

> Subject: RE: DC next week

>

> Yes. 2pm PST, 5PM EST. Sorry for not clarifying

>

> -----Original Message-----

> From: DCardoza@foley.com [<mailto:DCardoza@foley.com>]

> Sent: Thursday, November 10, 2016 10:48 AM

> To: Johnny Amaral

> Cc: rpatterson@mwdh2o.com; Brent Walthall; Dan Vink; Jason R. Phillips; dorth@davidorthconsulting.com; Tom Birmingham; Shelley Ostrowski; Steve Chedester; Jeff Sutton; Jason Peltier; David Bernhardt; Joe Raeder; Nancy E Williams; Hiltcher,Brad L

> Subject: Re: DC next week

>

> If that is 5pm Eastern I am available. Dennis

>

> Sent from my iPhone

>

> Please excuse any auto correct errors

>

> On Nov 10, 2016, at 12:46 PM, Johnny Amaral <jamaral@westlandswater.org<<mailto:jamaral@westlandswater.org>>> wrote:

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> Once the call gets scheduled, I will send out call in info.

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> Johnny

>
> From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
> Sent: Tuesday, November 8, 2016 8:43 AM
> To: rpatterson@mwdh2o.com<<mailto:rpatterson@mwdh2o.com>>; 'Brent Walthall'; Dan Vink (dvink@svwater.org<<mailto:dvink@svwater.org>>); 'Jason R. Phillips'; dorth@davidorthconsulting.com<<mailto:dorth@davidorthconsulting.com>>; Tom Birmingham (tbirmingham@westlandswater.org<<mailto:tbirmingham@westlandswater.org>>); 'Shelley Ostrowski'; Steve Chedester (schedester@sjrecwa.net<<mailto:schedester@sjrecwa.net>>); Jeff Sutton (jsutton
> Cc: David Bernhardt; Dennis Cardoza; 'Joe Raeder'; 'Nancy E Williams'; Hiltcher,Brad L (bhiltcher@mwdh2o.com<<mailto:bhiltcher@mwdh2o.com>>)
> Subject: DC next week

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>
>
>
> --
> BEGIN-ANTISPAM-VOTING-LINKS

> -----

>
> Teach CanIt if this mail (ID 01S6iN29Q) is spam:
> Spam: <https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=aafd87370542&t=20161110&c=s>
> Fraud/Phish: <https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=aafd87370542&t=20161110&c=p>
> Not spam: <https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=aafd87370542&t=20161110&c=n>
> Forget vote: <https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=aafd87370542&t=20161110&c=f>

> -----

> END-ANTISPAM-VOTING-LINKS
>

>

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From: David Orth

Sent: Thursday, November 10, 2016 2:10 PM

To: jamaral@westlandswater.org

CC: Jeff Sutton; Shelly Ostrowski; 'Jason R. Phillips' ; 'Joe Raeder'; David Bernhardt; Jason Peltier; Dennis Cardoza; Dan Vink; Hiltcher,Brad L; 'Nancy E Williams'; rpatterson@mwdh2o.com; Tom Birmingham; Steve Chedester; 'Brent Walthall'

Subject: RE: DC next week

I am available

Orth

Sent from my Verizon 4G LTE Droid

On Nov 10, 2016 10:47 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

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Once the call gets scheduled, I will send out call in info.

Johnny

From: Johnny Amaral [mailto:jamaral@westlandswater.org]

Sent: Tuesday, November 8, 2016 8:43 AM

To: rpatterson@mwdh2o.com; 'Brent Walthall'; Dan Vink (dvink@svwater.org); 'Jason R. Phillips'; dorth@davidorthconsulting.com; Tom Birmingham (tbirmingham@westlandswater.org); 'Shelley Ostrowski'; Steve Chedester (schedester@sjrecwa.net); Jeff Sutton (jsutton

Cc: David Bernhardt; Dennis Cardoza; 'Joe Raeder'; 'Nancy E Williams'; Hiltcher,Brad L
(bhiltcher@mwde2o.com)

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Johnny

From: Noles, Holly A. on behalf of Bernhardt, David L. [DBernhardt@BHFS.com]
Sent: Thursday, November 10, 2016 2:18 PM
To: 'Johnny Amaral'
Subject: RE: DC next week

Hey Johnny-

David is tied up from 5-6PM EST time tomorrow but can do any time after that.

-Holly

Holly Noles
Executive Assistant
Brownstein Hyatt Farber Schreck, LLP
1155 F Street N.W., Suite 1200
Washington, DC 20004
202.652.2352 tel
HNOLES@bhfs.com

-----Original Message-----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Thursday, November 10, 2016 1:50 PM
To: DCardoza@foley.com
Cc: rpatterson@mwdh2o.com; 'Brent Walthall'; 'Dan Vink'; 'Jason R. Phillips'; dorth@davidorthconsulting.com; 'Tom Birmingham'; 'Shelley Ostrowski'; 'Steve Chedester'; 'Jeff Sutton'; 'Jason Peltier'; Bernhardt, David L.; 'Joe Raeder'; 'Nancy E Williams'; 'Hiltscher,Brad L'
Subject: RE: DC next week

Yes. 2pm PST, 5PM EST. Sorry for not clarifying

-----Original Message-----

From: DCardoza@foley.com [<mailto:DCardoza@foley.com>]
Sent: Thursday, November 10, 2016 10:48 AM
To: Johnny Amaral
Cc: rpatterson@mwdh2o.com; Brent Walthall; Dan Vink; Jason R. Phillips; dorth@davidorthconsulting.com; Tom Birmingham; Shelley Ostrowski; Steve Chedester; Jeff Sutton; Jason Peltier; David Bernhardt; Joe Raeder; Nancy E Williams; Hiltscher,Brad L
Subject: Re: DC next week

If that is 5pm Eastern I am available. Dennis

Sent from my iPhone

Please excuse any auto correct errors

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STATEMENT OF CONFIDENTIALITY & DISCLAIMER: The information contained in this email message is attorney privileged and confidential, intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this email is strictly prohibited. If you have received this email in error, please notify us immediately by calling (303)-223-1300 and delete the message. Thank you.

From: Jason R. Phillips

Sent: Thursday, November 10, 2016 2:47 PM

To: Johnny Amaral

CC: DCardoza@foley.com; rpatterson@mwdh2o.com; Brent Walthall; Dan Vink; dorth@davidorthconsulting.com; Tom Birmingham; Shelley Ostrowski; Steve Chedester; Jeff Sutton; Jason Peltier; David Bernhardt; Joe Raeder; Nancy E Williams; Hiltscher,Brad L

Subject: Re: DC next week

Works for me.

Sent from my iPhone

> On Nov 10, 2016, at 10:49 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

> Yes. 2pm PST, 5PM EST. Sorry for not clarifying

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> To: Johnny Amaral

> Cc: rpatterson@mwdh2o.com; Brent Walthall; Dan Vink; Jason R. Phillips; dorth@davidorthconsulting.com; Tom Birmingham; Shelley Ostrowski; Steve Chedester; Jeff Sutton; Jason Peltier; David Bernhardt; Joe Raeder; Nancy E Williams; Hiltscher,Brad L

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> Sent: Tuesday, November 8, 2016 8:43 AM

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(schedester@sjrecwa.net<<mailto:schedester@sjrecwa.net>>); Jeff Sutton (jsutton

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(bhiltscher@mwdh2o.com<<mailto:bhiltscher@mwdh2o.com>>)

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> _____
> This communication, including any attachments or embedded links, is for the sole use of the intended recipient(s) and may contain information that is confidential or legally protected. If you are not the intended recipient, you are hereby notified that any review, disclosure, copying, dissemination, distribution or use of this communication is strictly prohibited. If you have received this communication in error, please do not download any attachments or embedded links, notify the sender immediately by return e-mail message or call, and delete the original and all copies of the communication from your system. Thank you for your anticipated cooperation.

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From: Nancy Williams

Sent: Thursday, November 10, 2016 3:25 PM

To: 'Johnny Amaral'; rpatterson@mwdh2o.com; 'Brent Walthall'; 'Dan Vink'; 'Jason R. Phillips'; dorth@davidorthconsulting.com; 'Tom Birmingham'; 'Shelley Ostrowski'; 'Steve Chedester'; 'Jeff Sutton'; 'Jason Peltier'

CC: 'David Bernhardt'; 'Dennis Cardoza'; 'Joe Raeder'; 'Hiltscher,Brad L'

Subject: RE: DC next week

Yes I will join – thanks JA

From: Johnny Amaral [mailto:jamaral@westlandswater.org]

Sent: Thursday, November 10, 2016 1:47 PM

To: rpatterson@mwdh2o.com; 'Brent Walthall' <bwaltall@kcwa.com>; Dan Vink <dvink@svwater.org>; 'Jason R. Phillips' <jphillips@friantwater.org>; dorth@davidorthconsulting.com; Tom Birmingham <tbirmingham@westlandswater.org>; 'Shelley Ostrowski' <sostrowski@westlandswater.org>; Steve Chedester <schedester@sjrecwa.net>; Jeff Sutton <jsutton@tccanal.com>; Jason Peltier <jason.peltier@sldmwa.org>

Cc: David Bernhardt <dbernhardt@bhfs.com>; Dennis Cardoza <dcardoza@foley.com>; 'Joe Raeder' <JRaeder@tfgnet.com>; 'Nancy E Williams' <nwilliams@swaconsult.com>; Hiltscher,Brad L <bhiltscher@mwdh2o.com>

Subject: RE: DC next week

Gang,

I'm emailing to check your availability to have a conference call to discuss the new lay of the land given the new developments this week. I've had several conversations with House members and Congressional staff since Tuesday, and I'm sure many of you have as well. Needless to say, there are a lot of ideas and thoughts being kicked around among the delegation.

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Please let me know if you are available for a call around 2pm on Friday afternoon.

Once the call gets scheduled, I will send out call in info.

Johnny

From: Johnny Amaral [mailto:jamaral@westlandswater.org]

Sent: Tuesday, November 8, 2016 8:43 AM

To: rpatterson@mwdh2o.com; 'Brent Walthall'; Dan Vink (dvink@svwater.org); 'Jason R. Phillips'; dorth@davidorthconsulting.com; Tom Birmingham (tbirmingham@westlandswater.org); 'Shelley Ostrowski'; Steve Chedester (schedester@sjrecwa.net); Jeff Sutton (jsutton

Cc: David Bernhardt; Dennis Cardoza; 'Joe Raeder'; 'Nancy E Williams'; Hiltscher,Brad L (bhiltscher@mwdh2o.com)

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Stay tuned....as soon as I know anything, I will share it immediately. And if you can, please share with the people on this email any questions, comments, info, or input you have about next weeks trip.

Johnny

From: Johnny Amaral

Sent: Thursday, November 10, 2016 4:36 PM

To: 'Patterson,Roger K'; 'Joe Raeder'

CC: DCardoza@foley.com; 'Brent Walthall'; 'Dan Vink'; 'Jason R. Phillips'; dorth@davidorthconsulting.com; 'Tom Birmingham'; 'Shelley Ostrowski'; 'Steve Chedester'; 'Jeff Sutton'; 'Jason Peltier'; 'David Bernhardt'; 'Nancy E Williams'; 'Hiltscher,Brad L'

Subject: RE: DC next week

Looks like 2pm works for most of the group. Thanks for your reply

Please use the following conference call info:

1-800-████-████

Passcode - ██████

Looking forward to it.

Thanks

-----Original Message-----

From: Patterson,Roger K [<mailto:RPatterson@mw2o.com>]

Sent: Thursday, November 10, 2016 1:03 PM

To: Joe Raeder

Cc: Johnny Amaral; DCardoza@foley.com; Brent Walthall; Dan Vink; Jason R. Phillips; dorth@davidorthconsulting.com; Tom Birmingham; Shelley Ostrowski; Steve Chedester; Jeff Sutton; Jason Peltier; David Bernhardt; Nancy E Williams; Hiltscher,Brad L

Subject: Re: DC next week

I can do that. Thx.

> On Nov 10, 2016, at 11:46 AM, Joe Raeder <JRaeder@tfgnet.com> wrote:

>

> Works for me

>

>

>

>

> Joe Raeder

> THE FERGUSON GROUP

> Office: 202-331-8500

> Cell: 202-████-████

>

>

>

>

>

> ----- Original message -----

> From: Johnny Amaral <jamaral@westlandswater.org>

> Date: 11/10/16 1:49 PM (GMT-05:00)

> To: DCardoza@foley.com

> Cc: rpatterson@mw2o.com, 'Brent Walthall' <bwalhall@kcwa.com>, 'Dan Vink' <dvink@svwater.org>, "Jason R. Phillips" <jphillips@friantwater.org>, dorth@davidorthconsulting.com, 'Tom Birmingham' <tbirmingham@westlandswater.org>, 'Shelley Ostrowski' <sostrowski@westlandswater.org>, 'Steve Chedester' <schedester@sjrecwa.net>, 'Jeff Sutton' <jsutton@tccanal.com>, 'Jason Peltier' <jason.peltier@sldmwa.org>, 'David Bernhardt' <dbernhardt@bhfs.com>, Joe Raeder <JRaeder@tfgnet.com>, 'Nancy E Williams' <nwilliams@swaconsult.com>, "Hiltscher,Brad L" <bhiltscher@mw2o.com>

> Subject: RE: DC next week

>

> Yes. 2pm PST, 5PM EST. Sorry for not clarifying

>

> -----Original Message-----

> From: DCardoza@foley.com [<mailto:DCardoza@foley.com>]
> Sent: Thursday, November 10, 2016 10:48 AM
> To: Johnny Amaral
> Cc: rpatterson@mw2dh.com; Brent Walthall; Dan Vink; Jason R. Phillips; dorth@davidorthconsulting.com; Tom Birmingham; Shelley Ostrowski; Steve Chedester; Jeff Sutton; Jason Peltier; David Bernhardt; Joe Raeder; Nancy E Williams; Hiltcher,Brad L
> Subject: Re: DC next week
>
> If that is 5pm Eastern I am available. Dennis
>
> Sent from my iPhone
>
> Please excuse any auto correct errors
>
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> To: rpatterson@mw2dh.com<<mailto:rpatterson@mw2dh.com>>; 'Brent Walthall'; Dan Vink (dvink@svwater.org<<mailto:dvink@svwater.org>>); Jason R. Phillips; dorth@davidorthconsulting.com<<mailto:dorth@davidorthconsulting.com>>; Tom Birmingham (tbirmingham@westlandswater.org<<mailto:tbirmingham@westlandswater.org>>); 'Shelley Ostrowski'; Steve Chedester (schedester@sjrecwa.net<<mailto:schedester@sjrecwa.net>>); Jeff Sutton (jsutton
> Cc: David Bernhardt; Dennis Cardoza; Joe Raeder; 'Nancy E Williams'; Hiltcher,Brad L (bhiltcher@mw2dh.com<<mailto:bhiltcher@mw2dh.com>>)
> Subject: DC next week
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>
> Johnny
>
> The preceding email message may be confidential or protected by the attorney-client privilege. It is not intended for transmission to, or receipt by, any unauthorized persons. If you have received this message in error, please (i) do not read it, (ii) reply to the sender that you received the message in error, and (iii) erase or destroy the message. Legal advice contained in the preceding message is solely for

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> --
> BEGIN-ANTISPAM-VOTING-LINKS

> -----

>
> Teach CanIt if this mail (ID 01S6iN29Q) is spam:
> Spam: <https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=aafd87370542&t=20161110&c=s>
> Fraud/Phish: <https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=aafd87370542&t=20161110&c=p>
> Not spam: <https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=aafd87370542&t=20161110&c=n>
> Forget vote: <https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=aafd87370542&t=20161110&c=f>

> -----

> END-ANTISPAM-VOTING-LINKS

>

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From: Tom Birmingham
Sent: Friday, November 11, 2016 11:35 AM
To: 'Johnny Amaral'
Subject: RE: DC next week

Johnny,

What is the call in number for this conference call?

Tom

-----Original Message-----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Thursday, November 10, 2016 10:50 AM
To: DCardoza@foley.com
Cc: rpatterson@mwdh2o.com; 'Brent Walthall' <bwaltall@kcwa.com>; 'Dan Vink' <dvink@svwater.org>; 'Jason R. Phillips' <jphillips@friantwater.org>; dorth@davidorthconsulting.com; 'Tom Birmingham' <tbirmingham@westlandswater.org>; 'Shelley Ostrowski' <sostrowski@westlandswater.org>; 'Steve Chedester' <schedester@sjrecwa.net>; 'Jeff Sutton' <jsutton@tccanal.com>; 'Jason Peltier' <jason.peltier@sldmwa.org>; 'David Bernhardt' <dbernhardt@bhfs.com>; 'Joe Raeder' <JRaeder@tfgnet.com>; 'Nancy E Williams' <nwilliams@swaconsult.com>; 'Hiltscher,Brad L' <bhiltscher@mwdh2o.com>
Subject: RE: DC next week

Yes. 2pm PST, 5PM EST. Sorry for not clarifying

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Sent: Thursday, November 10, 2016 10:48 AM
To: Johnny Amaral
Cc: rpatterson@mwdh2o.com; Brent Walthall; Dan Vink; Jason R. Phillips; dorth@davidorthconsulting.com; Tom Birmingham; Shelley Ostrowski; Steve Chedester; Jeff Sutton; Jason Peltier; David Bernhardt; Joe Raeder; Nancy E Williams; Hiltscher,Brad L
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If that is 5pm Eastern I am available. Dennis

Sent from my iPhone

Please excuse any auto correct errors

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From: Johnny Amaral
Sent: Friday, November 11, 2016 11:37 AM
To: Thomas Birmingham
Subject: Fwd: DC next week

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

Begin forwarded message:

From: Johnny Amaral <jamaral@westlandswater.org>
Date: November 10, 2016 at 3:35:31 PM PST
To: "Patterson,Roger K" <RPatterson@mwdh2o.com>, 'Joe Raeder' <JRaeder@tfgn.net>
Cc: DCardoza@foley.com, 'Brent Walthall' <bwalthall@kcwa.com>, 'Dan Vink' <dvink@svwater.org>, "Jason R. Phillips" <jphillips@friantwater.org>, dorth@davidorthconsulting.com, 'Tom Birmingham' <tbirmingham@westlandswater.org>, 'Shelley Ostrowski' <sostrowski@westlandswater.org>, 'Steve Chedester' <schedester@sjrecwa.net>, 'Jeff Sutton' <jsutton@tccanal.com>, 'Jason Peltier' <jason.peltier@sldmwa.org>, 'David Bernhardt' <dbernhardt@bhfs.com>, 'Nancy E Williams' <nwilliams@swaconsult.com>, "Hiltscher,Brad L" <bhiltscher@mwdh2o.com>
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Please use the following conference call info:

1-800-████-████
Passcode - █████

Looking forward to it.

Thanks

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To: Joe Raeder
Cc: Johnny Amaral; DCardoza@foley.com; Brent Walthall; Dan Vink; Jason R. Phillips; dorth@davidorthconsulting.com; Tom Birmingham; Shelley Ostrowski; Steve Chedester; Jeff Sutton; Jason Peltier; David Bernhardt; Nancy E Williams; Hiltscher,Brad L
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Office: 202-331-8500
Cell: 202-████-████

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Cc: David Bernhardt; Dennis Cardoza; 'Joe Raeder'; 'Nancy E Williams'; Hiltcher,Brad L (bhiltcher@mwdh2o.com<<mailto:bhiltcher@mwdh2o.com>>)

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--

BEGIN-ANTISPAM-VOTING-LINKS

Teach CanIt if this mail (ID 01S6iN29Q) is spam:

Spam: <https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=afd87370542&t=20161110&c=s>

Fraud/Phish:

<https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=aafd87370542&t=20161110&c=p>

Not

spam: <https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=aafd87370542&t=20161110&c=n>

Forget vote:

<https://antispam.roaringpenguin.com/canit/b.php?i=01S6iN29Q&m=aafd87370542&t=20161110&c=f>

END-ANTISPAM-VOTING-LINKS

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From: Johnny Amaral

Sent: Friday, November 11, 2016 1:22 PM

To: Ryan A. 'Smith; Denny Rehberg; Dennis Cardoza; David Bernhardt; Catherine Karen; Thomas Birmingham; sostrowski@westlandswater.org

Subject: Team

I talked to Tom earlier today and he would like for the team to get together for breakfast on Tuesday the 15th at our hotel. 8:00 AM.

We are staying at the Grand Hyatt on H St. See you there.

Best,

Johnny Amaral

Deputy General Manager - External Affairs

Westlands Water District

From: DCardoza@foley.com

Sent: Friday, November 11, 2016 1:31 PM

To: Johnny Amaral

CC: Ryan A. 'Smith; Denny Rehberg; David Bernhardt; Catherine Karen; Thomas Birmingham; sostrowski@westlandswater.org; CBelinky@foley.com

Subject: Re: Team

Great. Done. Dennis

Sent from my iPhone

Please excuse any auto correct errors

> On Nov 11, 2016, at 2:21 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

>

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>

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>

> Johnny Amaral

> Deputy General Manager - External Affairs

> Westlands Water District

>

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From: Denny Rehberg
Sent: Friday, November 11, 2016 1:57 PM
To: Johnny Amaral
CC: Ryan A. 'Smith; Dennis Cardoza; David Bernhardt; Catherine Karen; Thomas Birmingham; sostrowski@westlandswater.org
Subject: Re: Team

I'm in

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>
>
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> Deputy General Manager - External Affairs
> Westlands Water District
>
>

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From: Nancy Williams

Sent: Friday, November 11, 2016 4:48 PM

To: 'Johnny Amaral'; rpatterson@mwdh2o.com; 'Brent Walthall'; 'Dan Vink'; 'Jason R. Phillips'; dorth@davidorthconsulting.com; 'Tom Birmingham'; 'Shelley Ostrowski'; 'Steve Chedester'; 'Jeff Sutton'; 'Jason Peltier'

CC: 'David Bernhardt'; 'Dennis Cardoza'; 'Joe Raeder'; 'Hiltscher,Brad L'

Subject: RE: DC next week

To all –

The office of Schramm, Williams & Associates is at 512 C St., NE. We are on the NORTH side of Stanton Park, which is between 4th and 6th Streets., NE. It is an easy walk from the Union Station side of the Hart Bldg. – just walk east on C St. 2 blocks, you come to Stanton Park, walk around the left or north side of the Park (this is C St.), and our townhouse-office is 3 doors from the corner of 6th St. NE and Maryland Ave. NE. It is a double townhouse and painted in a light grey-green color; an American flag hangs on the front of the building, at the 2nd floor level. (Our neighbor's building is a noticeable yellow color.)

My cell phone is 202 [REDACTED] [REDACTED] if you need any further information. If you come by taxi, be sure to tell the driver you want to go to 512 C St. NORTHEAST on the NORTH side of Stanton Park – since C St. runs on both the north and south sides of the Park.

We look forward to seeing everyone at noon next Wednesday.

Nancy Williams

From: Johnny Amaral [mailto:jamaral@westlandswater.org]

Sent: Thursday, November 10, 2016 1:47 PM

To: rpatterson@mwdh2o.com; 'Brent Walthall' <bwalthall@kcwa.com>; Dan Vink <dvink@svwater.org>; 'Jason R. Phillips' <jphillips@friantwater.org>; dorth@davidorthconsulting.com; Tom Birmingham <tbirmingham@westlandswater.org>; 'Shelley Ostrowski' <sostrowski@westlandswater.org>; Steve Chedester <schedester@sjrecwa.net>; Jeff Sutton <jsutton@tccanal.com>; Jason Peltier <jason.peltier@sldmwa.org>

Cc: David Bernhardt <dbernhardt@bhfs.com>; Dennis Cardoza <dcardoza@foley.com>; 'Joe Raeder' <JRaeder@tfgnet.com>; 'Nancy E Williams' <nwilliams@swaconsult.com>; Hiltscher,Brad L <bhiltscher@mwdh2o.com>

Subject: RE: DC next week

Gang,

I'm emailing to check your availability to have a conference call to discuss the new lay of the land given the new developments this week. I've had several conversations with House members and Congressional staff since Tuesday, and I'm sure many of you have as well. Needless to say, there are a lot of ideas and thoughts being kicked around among the delegation.

I think we need to put our heads together to map out our strategy for next Wednesday's meeting and to share information we've received from our individual discussions with them. We need to prepare to respond to comments and questions that will certainly come from Members and staff at the meeting on Wednesday, and being on the same page ahead of time is paramount.

Please let me know if you are available for a call around 2pm on Friday afternoon.

Once the call gets scheduled, I will send out call in info.

Johnny

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]

Sent: Tuesday, November 8, 2016 8:43 AM

To: rpatterson@mwdh2o.com; 'Brent Walthall'; Dan Vink (dvink@swwater.org); 'Jason R. Phillips'; dorth@davidorthconsulting.com; Tom Birmingham (tbirmingham@westlandswater.org); 'Shelley Ostrowski'; Steve Chedester (schedester@sjrecwa.net); Jeff Sutton (jsutton

Cc: David Bernhardt; Dennis Cardoza; 'Joe Raeder'; 'Nancy E Williams'; Hiltscher,Brad L (bhiltscher@mwdh2o.com)

Subject: DC next week

Gang,

I had dinner last night with Phillips and Chedester in Sacramento and we briefly discussed scheduling items for next week. Aside from the 5pm meeting on Wednesday in Leader McCarthys office, things are a bit fluid.

But, we discussed having a pre-planning meeting before the big show in Kevins office. So, given that Orth is arriving on the red eye at 7 am on Wednesday, lets meet for the pre planning meeting in the Longworth Cafeteria at 12:30 on Wednesday. Please make sure to keep that time frame clear.

After today, we can work on plugging in any other meetings that need to be scheduled. As some of you know, there are a few irons on the fire that we expect to work out in the next 48 hours, including meetings both the House and Senate side.

Stay tuned....as soon as I know anything, I will share it immediately. And if you can, please share with the people on this email any questions, comments, info, or input you have about next weeks trip.

Johnny

From: Johnny Amaral
Sent: Sunday, November 13, 2016 5:59 PM
To: David L. Bernhardt
Subject: Dinner with Kiel weaver Monday night

Can you have someone from your staff make a reservation for Monday night at 7 PM.

Anywhere in DC is fine except cap Grille or delfriscos.

Make it for 7 PM and a party of six

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

From: Bernhardt, David L.
Sent: Sunday, November 13, 2016 6:16 PM
To: Johnny Amaral
Subject: Re: Dinner with Kiel weaver Monday night

How about oceaniarre?

David Bernhardt

> On Nov 13, 2016, at 7:59 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:
>
>
> Can you have someone from your staff make a reservation for Monday night at 7 PM.
>
> Anywhere in DC is fine except cap Grille or delfriscos.
>
> Make it for 7 PM and a party of six
>
> Best,
>
> Johnny Amaral
> Deputy General Manager - External Affairs
> Westlands Water District
>
>

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From: Johnny Amaral
Sent: Sunday, November 13, 2016 6:26 PM
To: Bernhardt, David L.
Subject: Re: Dinner with Kiel weaver Monday night

Ok

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

> On Nov 13, 2016, at 5:17 PM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

>

> How about oceaniarre?

>

> David Bernhardt

>

>

>> On Nov 13, 2016, at 7:59 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

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>>

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>> Best,

>>

>> Johnny Amaral

>> Deputy General Manager - External Affairs

>> Westlands Water District

>>

>>

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From: Noles, Holly A.
Sent: Monday, November 14, 2016 8:55 AM
To: 'Johnny Amaral'; Bernhardt, David L.
Subject: RE: Dinner with Kiel weaver Monday night

Hi Johnny-

Reservations have been made at Oceanaire for 7PM under David's name. The address is at 1201 F Street, NW.

Please let me know if there is anything else I can help with.

-Holly

Holly Noles
Executive Assistant
Brownstein Hyatt Farber Schreck, LLP
1155 F Street N.W., Suite 1200
Washington, DC 20004
202.652.2352 tel
HNOLES@bhfs.com

-----Original Message-----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Sunday, November 13, 2016 7:59 PM
To: Bernhardt, David L.
Subject: Dinner with Kiel weaver Monday night

Can you have someone from your staff make a reservation for Monday night at 7 PM.

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Make it for 7 PM and a party of six

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

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From: Johnny Amaral
Sent: Monday, November 14, 2016 8:58 AM
To: Noles, Holly A.
CC: Bernhardt, David L.
Subject: Re: Dinner with Kiel weaver Monday night

That's perfect. Thank you

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

> On Nov 14, 2016, at 8:55 AM, Noles, Holly A. <HNOLES@bhfs.com> wrote:

>
> Hi Johnny-
>
> Reservations have been made at Oceanaire for 7PM under David's name. The address is at 1201 F Street, NW.
>
> Please let me know if there is anything else I can help with.

>
> -Holly

>
> Holly Noles
> Executive Assistant
> Brownstein Hyatt Farber Schreck, LLP
> 1155 F Street N.W., Suite 1200
> Washington, DC 20004
> 202.652.2352 tel
> HNOLES@bhfs.com

>
> -----Original Message-----
> From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
> Sent: Sunday, November 13, 2016 7:59 PM
> To: Bernhardt, David L.
> Subject: Dinner with Kiel weaver Monday night

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> Deputy General Manager - External Affairs
> Westlands Water District

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recipient, you are hereby notified that any dissemination, distribution or copy of this email is strictly prohibited. If you have received this email in error, please notify us immediately by calling (303)-223-1300 and delete the message. Thank you.

From: Johnny Amaral
Sent: Tuesday, November 15, 2016 12:09 PM
To: Thomas Birmingham; Shelley Ostrowski; David L. Bernhardt
Subject: Dinner tonight

Has been moved to 6 PM at the capital Grille

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

From: Bernhardt, David L.

Sent: Tuesday, November 15, 2016 4:20 PM

To: jamaral@westlandswater.org

Subject: I'm stuck with in a room with Connor and Jewell and can't get out

David Bernhardt

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From: Johnny Amaral
Sent: Tuesday, November 15, 2016 4:54 PM
To: Bernhardt, David L.
Subject: Re: I'm stuck with in a room with Connor and Jewell and can't get out

Tom wants you here. Can you escape?

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

> On Nov 15, 2016, at 6:20 PM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

>

>

>

> David Bernhardt

>

>

>

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From: Bernhardt, David L.

Sent: Tuesday, November 15, 2016 5:14 PM

To: Johnny Amaral

Subject: Re: I'm stuck with in a room with Connor and Jewell and can't get out

On my way

David Bernhardt

> On Nov 15, 2016, at 6:54 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

>

> Tom wants you here. Can you escape?

>

> Best,

>

> Johnny Amaral

> Deputy General Manager - External Affairs

> Westlands Water District

>

>

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>> David Bernhardt

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>

From: Johnny Amaral
Sent: Tuesday, November 15, 2016 7:32 PM
To: Thomas Birmingham; David L. Bernhardt
Subject: Meeting tomorrow morning

Let meet at the hotel at 9:00 am.

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

From: Tom Birmingham
Sent: Wednesday, November 16, 2016 4:40 AM
To: Michelle Ostrowski
Subject: Fwd: Meeting tomorrow morning

Sent from my iPhone

Begin forwarded message:

From: "Johnny Amaral" <jamaral@westlandswater.org>
Date: November 15, 2016 at 9:32:16 PM EST
To: Thomas Birmingham <tbirmingham@westlandswater.org>, "David L. Bernhardt" <dbernhardt@bhfs.com>
Subject: Meeting tomorrow morning

Let meet at the hotel at 9:00 am.

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

From: Tom Birmingham
Sent: Thursday, November 17, 2016 7:18 AM
To: 'Bernhardt, David L.'
Subject: Google Alert - San Luis Delta Mendota Water Authority

From: Google Alerts <googlealerts-noreply@google.com>
Date: November 16, 2016 at 11:01:13 PM EST
To: [REDACTED]@[REDACTED].[REDACTED]
Subject: Google Alert - San Luis Delta Mendota Water Authority

Google Alerts


San Luis Delta Mendota Water Authority

Daily update · November 17, 2016

NEWS

[From the **Delta** to the Desert: Trump's Interior Pick Bad News for California **Water**](#)
KCET

Bernhardt is no stranger to internal Interior Department politics. ... both Westlands and the **San Luis & Delta Mendota Water Authority** to argue that ...

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From: Michael Burns

Sent: Thursday, November 17, 2016 2:30 PM

To: Ed Manning; Johnny Amaral (jamaral@westlandswater.org); Carolyn Jensen

Subject: FYI

Meet the man deciding the Department of the Interior's future

Brittany Patterson, E&E News reporter

Published: Thursday, November 17, 2016



David Bernhardt, former Interior Department solicitor general under President George W. Bush, is leading the transition for that agency under President-elect Donald Trump. Photo courtesy of Brownstein Hyatt Farber Schreck LLP.

Early in his career as a staffer for former Rep. Scott McInnis (R-Colo.), David Bernhardt sent a letter that contained a grammatical error.

It was just a little mistake, McInnis recalled, something as small as a missing word. But it had a big impact on the young kid from small-town Colorado.

"When I told him about the error, oh my God, I thought I was going to break the kid's heart," McInnis said. "I just kind of meant it as 'Hey, you know, you've got to watch this stuff.' It was a big deal. He's very proud of his work product."

That reputation for thoroughness and perfection has followed Bernhardt through his career as a lawyer and later solicitor in President George W. Bush's Interior Department, people who have worked with him say. Now the 47-year-old lawyer holds key decisions in his hands as he heads up Interior's transition team under President-elect Donald Trump. As reports continue to come in that Trump leadership is ousting lobbyists from the transition effort, it's not clear whether it's a position Bernhardt will keep ([**E&ENews PM**](#), Nov. 16).



E&E News' ongoing coverage of the new administration and the changes taking place on Capitol Hill. [**Click here**](#) to view the continuing coverage.

Those who know Bernhardt describe him as unequivocally one of the most hardworking and intelligent individuals they know, well-versed in the complicated statutes that drive public lands policy, and someone with actual Western street cred.

"He's not a creature of Washington, yet knows a lot about how Washington and Interior work," said Kevin Ewing, an attorney and partner at Bracewell LLP. "He's got a broad view from which to offer wise counsel in a time of transition."

A native of the tiny western Colorado oil town of Rifle, Bernhardt grew up hiking, hunting, skiing and riding on the federal lands in Garfield County. He once told a Senate committee that he had seen firsthand what happens to a town dependent on natural resources when Colorado's oil shale industry crashed in 1982.

He dropped out of high school, choosing instead to get his GED and then a bachelor's degree at the University of Northern Colorado. He interned at the Supreme Court and graduated with honors from the George Washington University National Law Center.

Bernhardt quickly moved up the ranks in McInnis' office, leading his legislative policy team and representing the congressman in the House Rules Committee. That's where he met his wife, Gena Rae Bernhardt, who also worked with the committee. They have two children together.

"He's serious and intelligent. He also has an intimate awareness of the rules," McGinnis said. "The only bad thing about David was I knew it was too good to be true. He just had a lot more capability than being a legislative director, so I knew I wasn't going to be able to keep him too long once he got a little exposure and people got to work with him."

Bernhardt spent three years as an associate with the law firm now called Brownstein Hyatt Farber Schreck LLP before being tapped by Bush to become a top counselor for then-Interior Secretary Gale Norton.

He held many positions in the agency, including special assistant to the secretary, counselor to the secretary, director of congressional and legislative affairs, and deputy chief of staff in the Office of the Secretary.

In 2006, he was confirmed as solicitor of the Interior Department, a position he held until 2009.

As general counsel and Interior's No. 3 official for the wide-reaching agency, Bernhardt oversaw hundreds of lawyers. He had fires to extinguish on day one, he said in congressional testimony, as he inherited an office that had been disconnected from the Internet since 2001.

For those looking for hints as to what a Trump Interior Department might look like, it is notable that Bernhardt served inside the agency for nearly the entirety of the Bush administration.

"It's a huge advantage to have someone in that position who has that level of knowledge," said Lynn Scarlett, global managing director of public policy for the Nature Conservancy.

Like Bernhardt, Scarlett served the full eight years of the Bush administration at Interior, as deputy secretary and chief operating officer, and in other positions.

She noted that his positions in the agency cut across myriad Interior issues.

"He knows what's doable," she said. "He knows what the procedures and constraints are."

Under his tenure, Bernhardt advised on policies such as the development of a five-year offshore leasing plan for the outer continental shelf, creation of a policy for offshore development of wind energy and a rule to list the polar bear as a threatened species under the Endangered Species Act.

In 2007, Bush appointed him to lead the International Boundary Commission between the United States and Canada.

After his stint at Interior, Bernhardt went back to Brownstein Hyatt Farber Schreck, where he co-chairs the law firm's Natural Resources Department. He led the Interior agency review team for Mitt Romney's 2012 transition operation.

Having gotten to know Bernhardt over the years, Ewing said his background in the government coupled with private-sector experience will make him invaluable during this time of transition. And Bernhardt, for his part, has made clear he knows full well the reverberations agency moves can have.

"I know firsthand that the decisions made at the Department of the Interior can have long-standing and very real social and environmental impacts," Bernhardt told lawmakers at that 2006 hearing, adding, "I understand the importance of obtaining meaningful input to help ensure informed federal decisions."

Reporter Mike Soraghan contributed.

Michael Burns

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p. 916.448.2162 m. 916.600.1271 f. 916.448.4923

w. www.ka-pow.com e. mburns@ka-pow.com

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From: Bernhardt, David L.

Sent: Friday, November 18, 2016 5:39 AM

To: Johnny Amaral; Thomas W. (Tom) Birmingham Esq.

Subject: Fwd: Morning Energy, presented by the National Association of Manufacturers: Could California drought deal actually get done? — AGs ordered deposited in Exxon case — McKinley for EPA chief?

FYI

Sent from my iPhone

Begin forwarded message:

From: POLITICO Pro Energy <politicoemail@politicopro.com>

Date: November 18, 2016 at 5:48:29 AM EST

To: <dbernhardt@BHFS.com>

Subject: Morning Energy, presented by the National Association of Manufacturers: Could California drought deal actually get done? — AGs ordered deposited in Exxon case — McKinley for EPA chief?

Reply-To: POLITICO subscriptions <reply-fe8c1270736d037c73-630326_HTML-637932022-1376319-0@politicoemail.com>

By Anthony Adragna | 11/18/2016 05:45 AM EDT

With help from Annie Snider and Sara Stefanini

CALIFORNIA (DROUGHT) DREAMIN': Lawmakers on both sides of the Capitol are hopeful that this could be the year Congress finally reaches a deal on California water. Time is running out, but the success or failure of drought talks could have big implications for the rest of Congress' unfinished business, including a major water infrastructure package, an energy bill and a spending measure to keep the government open past Dec. 9.

California's House Republicans have made sure all year that their drought language was in the mix whenever Congress talked water, and there's a high-profile water issue in play now: funding to help Flint, Mich., recover from its lead-contamination crisis. While Energy and Commerce Committee Chairman Fred Upton [said Thursday](#) he has a commitment from House Speaker [Paul Ryan](#) to add funds to a spending package, some argue Flint aid shouldn't move alone. "Water issues are affecting communities across the country and House Republicans have always said they will be dealt with together, not independent of one another," a House Republican leadership aide told ME.

Hot and heavy: Negotiations have accelerated between Sen. [Dianne Feinstein](#) and House Majority Leader [Kevin McCarthy](#) on a package to send more water to drought-parched central and southern California and prepare for a water-stressed future. Meanwhile, Democrats and Republicans leading energy bill negotiations say they have been working on West-wide drought provisions that could also gain traction. But it's not all kumbaya. Many of California's House Democrats — and, at times, Sen. [Barbara Boxer](#) — have opposed previous iterations of the drought bill, and are especially worried now that Trump's administration will be in the driver's seat for endangered species protections. "It's now a different Interior Department. The political moment for, 'Well, we'll trust the scientific process,' seems like it should have shifted," one House Democratic aide said.

Don't forget, we've been here before. Heated drought negotiations have become a regular fixture of late fall on Capitol Hill, and each time, like clockwork, they've fallen apart. Last year their unraveling was particularly spectacular, with Feinstein accusing Republicans of acting behind her back, and furious House GOP-ers assembling a press conference to skewer the Democrat.

Speaking of the energy bill, Sens. [Lisa Murkowski](#) and [Maria Cantwell](#) are expecting a counter offer today from House energy bill negotiators to a proposal the senators sent them last month, but expressed disappointment and frustration over the pace of the talks. As Pro's Nick Juliano [reports](#), discussions earlier this week indicated several sticking points remained on issues like the Land and Water Conservation Fund, energy efficiency and liquefied natural gas exports. The offer Murkowski and Cantwell sent their House counterparts last month jettisoned a proposal to make the LWCF permanent in favor of a long-term reauthorization with additional reforms. "I think it's more about a very good-faith offer ... We made a lot of compromises," Cantwell told reporters.

TGIF FRIENDS! Welcome to Friday! I'm your host Anthony Adragna, and James Garfield is the only president to date elected directly from the House. Your question today: What former president later went back and served in the Senate? Send your tips, energy gossip and comments to aadragna@politico.com, or follow us on Twitter [@AnthonyAdragna](#), [@Morning_Energy](#), and [@POLITICOPro](#).

As a Pro, you have access to Pro's transition-focused newsletter: Transition 2017. This new offering covers the who, what, when and why of the presidential transition, providing the insight you need to navigate the changing landscape in Washington. It will land in your inbox every afternoon through early spring. [Sign up today](#).

DEPOSITIONS FOR AGs IN EXXON CASE: Exxon Mobil's lawyers will be able to depose Massachusetts Attorney General Maura Healey and New York AG Eric Schneiderman in a lawsuit that seeks to quash the states' subpoenas for the fossil fuel giant's records regarding its climate change research and public statements on the issue, Pro's Matt Daily [reports](#). U.S. District Court Judge Ed Kinkeade made the [order](#) late Thursday as he seeks to determine whether the AGs' investigation was in "bad faith," a legal determination necessary for him to keep the case in federal court.

TRANSITION AGENCY PAPERWORK SIGNED: Trump's transition team can begin receiving briefings and go into federal agencies after filing the last pieces of necessary paperwork late Thursday afternoon, POLITICO's Nancy Cook [reports](#). Point people leading the transition for EPA and other domestic policy agencies will [be named](#) by next Wednesday.

Also worth reading: Trump's aggressive lobbying restrictions have sent a shockwave through K St., Pro's Andrew Restuccia [reports](#).

ME FIRST: MCKINLEY FOR EPA ADMIN? Count Rep. [David McKinley](#) (R-W.Va.), one of the strictest regulatory critics of the Obama EPA, as interested in leading the agency. The ideal EPA administrator is "someone that understands the process and does not have an agenda to do away with the agency — I think we need an EPA — but I think someone who comes from more of a business background who understands there has to be balance," he tells ME. McKinley sees those traits in his background and has expressed his interest.

BOTTLED WATER BATTLE ROYALE: Michigan Gov. Rick Snyder's administration is appealing a judge's order that requires officials to deliver bottled water to Flint residents who

lack verifiably safe drinking water. In a [motion](#) filed with the court Thursday, the state argued that most Flint homes have effective filters, and that going to the lengths required by the court would actually undercut long-term recovery efforts by decreasing the amount of water flowing through the system — key to re-coating the lead pipes — and sapping money from projects replacing lead pipes. Citizens groups and environmental organizations argued, and the judge agreed, that many residents lack access to bottled water due to disabilities or transportation challenges.

**** A message from the National Association of Manufacturers:** It's time for America to come together. The National Association of Manufacturers believes moving forward means #BeTheSolution. Investment in infrastructure, including ways to further advance energy infrastructure, is a promising place to start. Learn more about the NAM's infrastructure initiative, "Building to Win," and how, together, we can build economic growth.

<http://www.nam.org/buildingtowin> **

HOEVEN SEES QUICK KEYSTONE APPROVAL: One of the Keystone XL pipeline's top Senate backers, [John Hoeven](#), predicts the incoming Trump administration will quickly approve the controversial project next year. But Congress is looking at how it might step in if the executive branch could not move quickly enough, he said. "If it's a case where the president can just approve it, then that's what I expect to happen. If there is a role that Congress would need to play in order to move it along, then we'll do that," the North Dakota Republican told reporters Thursday.

It ain't me: Hoeven predicted the Trump administration would select good people for top posts in the Energy and Interior departments who believe "energy security comes from producing more energy from all sources," but said he wouldn't serve himself.

WHAT A SCENE: Sen. [Sheldon Whitehouse](#) playing traffic cop at the Senate subways. He implored a scrum of energy reporters surrounding Sen. Lisa Murkowski to "clear a path for the senator" as outgoing Sen. [Barbara Mikulski](#) hustled off to vote.

CAN TRUMP YANK MONUMENT DESIGNATIONS? House Natural Resources Chairman [Rob Bishop](#) wants President-elect Trump to rescind Obama's national monument designations and isn't concerned that such a move would be unprecedented: "It's never been done before and that's why people are saying, 'you can't do it.' Of course you can do it. It's always been implied," the Utah Republican said. Obama has designated or enlarged dozens of monuments during his presidency.

Snark warning: Asked if he'd made contact with Trump's transition team, Bishop quipped: "If you can tell me who's on the transition team, I can tell whether I've spoken to them or not." His committee, of course, has jurisdiction over the Interior Department.

WYDEN WON'T GIVE UP ON EXTENDERS: Even though [House](#) and [Senate](#) GOP tax writers don't seem to have much appetite for extending a host of renewable energy tax incentives during the lame duck, top Senate Finance Committee Democrat [Ron Wyden](#) isn't giving up. "I've made it very clear that I very much want renewable energy incentives, particularly where there have been pledges made, and all sides have said it was a mistake it didn't happen," the Oregon Democrat told reporters Thursday.

SHARPENING THOSE KNIVES: From conversations with more than half a dozen Republican lawmakers this week, it's clear EPA's Clean Power Plan and Waters of the U.S. regulations are top targets for Congress next year. Neither of those rules falls under the

Congressional Review Act, but expect GOP lawmakers to push early rollbacks as a way to earn quick points for the incoming Trump administration. "You'll see that right out of the blocks," Hoeven told ME.

SANDERS VOWS 'TOOTH AND NAIL' FIGHT ON CLIMATE: Donald Trump's view that climate change is a hoax manufactured by the Chinese is "way out of touch," Sen. Bernie Sanders said Thursday at a Christian Science Monitor [breakfast](#). He vowed to fight him "tooth and nail" on efforts to roll back progress on climate change and warned of broader implications from U.S. backpedaling on climate action. "If the United States turns away from combating climate change, there is no reason to believe that China, Russia, India, other large countries will not do the same," Sanders said.

CLOSE TO BERNIE'S HEART: Each day 1,800 tons of pine and timber slash, sustainably harvested within a 60-mile radius and ground into wood chips provide half the electricity needs of Burlington, Vt., POLITICO's Colin Woodard [reports](#). "Together these sources helped secure Burlington the distinction of being the country's first city that draws 100 percent of its power from renewable sources. The net energy costs are cheap enough that the city has not had to raise electric rates for its customers in eight years. And Burlington is not done in its quest for energy conservation." More from Colin [here](#) and check out the [Chubby Muffin](#) if you go. (Sorry, your ME host went to school in Vermont.)

DECENT PROGRESS AT COP22: Climate negotiators in Morocco say they've made some headway at United Nations talks but not as much as they'd hoped. "Progress has not been spectacular, I'll be quite frank," said Leon Charles, a Grenada delegate speaking on behalf of Caribbean countries. "There are some areas that in our view could have moved further than they have to date, so we would characterize progress as steady. But at least we've gotten everything off to a start, there are no major hiccups."

INDIA STICKS WITH ITS CLIMATE COMMITMENTS: A day before the climate talks are officially due to wrap, India's Environment Minister Shri Anil Madhav Dave told POLITICO Europe's Kalina Oroschakoff that the country was going ahead with "the commitments that we have made under the Paris agreement. We are going to move ahead on that part." Asked whether Donald Trump's election makes a difference to India's position, he said, "As of now there is no change in that stance. ... We continue with the same policy." Dave also wants the negotiations to focus more on issues related to technology transfer, capacity building and sustainable lifestyle, which are "very important" issues. Of course, climate finance or how much developed countries channel to developing countries remains a key issue.

MUSK'S MERGER OK'D: Electric vehicle maker Tesla and rooftop solar company SolarCity received the formal shareholder stamp of approval to merge Thursday, Pro's Esther Whieldon [reports](#). Excluding the votes of Musk and other shareholders who had an affiliation with SolarCity, more than 85 percent of shares were cast in favor of the corporate marriage, Tesla said. The companies expect to complete the transaction "in the coming days," Tesla said in a statement.

COAL, ENERGY COMPANIES PAST HOEKSTRA CLIENTS: Former Rep. Peter Hoekstra, a potential Donald Trump pick to run the CIA, currently represents Michigan-based oil production outfit [Core Energy](#) through his Hoekstra Global Strategies firm, POLITICO's Benjamin Oreskes [reports](#). In his work before that, at Greenberg Traurig and Dickstein Shapiro, Hoekstra [lobbied](#) on behalf of multiple domestic corporations, including coal giant Peabody Energy.

FAISON'S LATEST LOBBYIST ADDITION: Zakir Baig, a former aide to Sen. [David Vitter](#), registered to lobby for ClearPath Action Fund, Jay Faison's Republican climate group, on H.R. 4979, the Advanced Nuclear Technology Development Act of 2016; H.R. 8, the North American Energy Security and Infrastructure Act of 2015; S. 2012, the North American Energy Security and Infrastructure Act of 2016; and H.R. 4622, the Carbon Capture Act (h/t POLITICO Influence).

FELONY CHARGES OUT IN DAKOTA ACCESS PROTESTS: A judge dismissed felony charges against 139 demonstrators fighting the Dakota Access pipeline in North Dakota, the Bismarck Tribune [reports](#). Each of the protesters faced a felony count of conspiracy to endanger by fire or explosion and two other misdemeanor counts.

LAST REGULATORY AGENDA RELEASED: The Obama administration released its [final regulatory agenda](#) Thursday afternoon. And if they're worried about congressional backlash to so-called midnight regulations, they aren't showing it. EPA intends to complete more regulations concerning HFCs and revamping its greenhouse gas reporting program before the end of the administration, while the Army Corps of Engineers has begun work on a rule overhauling its consultation process with Native American tribes.

MOVER, SHAKER! NEW NARUC PRESIDENT: Pennsylvania Public Utility Commissioner Robert Powelson has become the 128th president of the National Association of Regulatory Utility Commissioners. He replaces Immediate Past President Travis Kavulla of Montana.

QUICK HITS

- Southern drought to intensify through winter, NWS predicts. [Tucson News Now](#).
- Momentum on climate change poses hurdle for Trump. [Houston Chronicle](#).
- Appeals court revives Energy Future bond claims. [MarketWatch](#).
- N.Y. regulators approve FitzPatrick nuclear plant sale. [Syracuse.com](#).
- Trump pullout from climate deal would make odd couple with Nicaragua. [Reuters](#).
- The Trump Effect on Environmental Investing: Positive? [AP](#).

HAPPENING FRIDAY

10 a.m. — "[IEA's World Energy Outlook 2016](#)," The Center for Strategic and International Studies, 1616 Rhode Island Avenue NW

2 p.m. — The Center for Strategic and International Studies [launches](#) the U.S.-India State and Urban Initiative, 1616 Rhode Island Avenue NW

THAT'S ALL FOR ME!

**** A message from the National Association of Manufacturers:** Over 1,100 business leaders sent a message to the president-elect last week: it's time for healing and to come together. The letter, led by the National Association of Manufacturers, stressed the "urgent need to restore faith

in our vital economic and government institutions and to bolster the promise of America." To #BeTheSolution, let's start with infrastructure, a bipartisan priority. Let's rebuild our roads, bridges, ports, passenger rail and transit systems. Let's invest in pipelines, railroads, tunnels and airports as well as drinking water and wastewater systems. The "Building to Win" initiative lays it all out. From transportation infrastructure to the energy infrastructure that powers our country, we can build a stronger, more inclusive economy. America is falling behind the rest of the world, but with a serious, targeted plan we can secure our economic leadership, spur real economic growth and offer more people the dignity of work. Learn more about how manufacturers are committed to #BeTheSolution. <http://www.nam.org/buildingtowin> **

To view online:

<https://www.politicopro.com/tipsheets/morning-energy/2016/11/could-california-drought-deal-actually-get-done-020193>

Stories from POLITICO Pro

Upton: Flint aid to be attached to spending package [Back](#)

By Annie Snider | 11/17/2016 12:54 PM EDT

House Energy and Commerce Chairman [Fred Upton](#) said that aid to address lead contamination in Flint, Mich., will most likely hitch a ride on a spending package, rather than the Water Resources Development Act that is currently being negotiated.

"We'll see how this plays out, but the thought is at this point that we'll do a CR through the end of February or so. Our goal is to have it in that. If not, it will be in the omnibus. It will be in one of the two, and our preference is that it be in the CR," Upton told reporters this afternoon.

The House and Senate both approved aid packages for Flint in their WRDA bills, although the packages differed significantly, with the Senate measure spending \$220 million on Flint and infrastructure programs for other communities, and the House provision offering a \$170 million authorization to aid communities with a lead contamination crisis. Key negotiators this week have said the WRDA negotiations are going slower than they would like, throwing into question whether a final package will be completed this year.

Upton said House Speaker [Paul Ryan](#) has reiterated his commitment to getting Flint aid done. He said a final deal would "probably" come in at the House funding level, but as appropriations.

"Flint's going to get their money, that's the bottom line," Upton said.

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Senate energy bill negotiators eager for House counteroffer [Back](#)

By Nick Juliano | 11/17/2016 05:37 PM EDT

House energy bill negotiators are expected to deliver a counteroffer on Friday to a proposal the senators sent them last month, Sens. [Lisa Murkowski](#) and [Maria Cantwell](#) said today after an hourlong meeting with their counterparts from the lower chamber.

The chair and ranking member of the Senate Energy and Natural Resources Committee seemed frustrated at the slow pace of negotiations. Murkowski and Cantwell sent over a detailed offer three weeks ago that included hundreds of pages of legislative text, but they said discussions earlier this week indicated several sticking points remained on issues like the Land and Water Conservation Fund, energy efficiency and liquefied natural gas exports.

"I think it is important that we actually get something concrete back, and it's just been disappointing that it has taken this long," Murkowski said.

The senators' offer backed away from a call for a permanent LWCF reauthorization — something House Natural Resources Chairman [Rob Bishop](#) had labeled a nonstarter. Instead, the senators proposed extending the LWCF for "a very, very long period of time," and included additional reforms beyond what was in the original Senate energy bill (S. 2012), Cantwell said.

"I think it's more about a very good-faith offer. ... We made a lot of compromises," Cantwell told reporters.

Bishop left the meeting saying they may be able to agree on some small-bore provisions but remain far apart the biggest pieces of the bill. With every day that goes by, he said, "my optimism kind of fades." House Energy and Commerce Chairman [Fred Upton](#) said, "We're going to keep talking."

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Massachusetts, New York AGs to be deposed in Exxon climate case [Back](#)

By Matt Daily | 11/17/2016 06:31 PM EDT

A federal judge ruled today that Exxon Mobil's lawyers could depose Massachusetts Attorney General Maura Healey in Dallas as part of the oil company's civil lawsuit against the states that have targeted its climate change activities.

In the [order](#), U.S. District Court Judge Ed Kinkeade also said he intended to order New York AG Eric Schneiderman to travel to Texas to be deposed in the suit that seeks to quash the states' subpoenas for Exxon's records regarding its climate change research and public statements on the issue.

Healey and Schneiderman are probing whether Exxon engaged in fraud by downplaying the threat to its business posed by potential climate change regulations, while Exxon has countered that the prosecutors' actions were a politically motivated campaign designed to punish the company for advocating a policies the attorneys general opposed.

"We did not start this, but we will see it through and will vigorously defend ourselves against false allegations and mischaracterizations of our climate research and investor communications," Exxon spokesman Alan Jeffers said in a statement.

Kinkeade is seeking to determine whether the AGs' investigation was in "bad faith," a legal determination necessary for him to keep the case in federal court. If he does not find fault with their actions, the case will be sent to state court.

A spokesman for Schneiderman said only that the AGs office would "respond appropriately." Healey's office was not immediately available to comment.

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Trump team files paperwork to gain admission to federal agencies [Back](#)

By Nancy Cook | 11/17/2016 05:43 PM EDT

The Trump transition team filed the last pieces of necessary paperwork late this afternoon that enable it to start receiving briefings and to go into federal agencies.

The document, called the Memorandum of Understanding or "[MOU](#)," basically kicks off the transfer of power from one presidency to the next and lets the future Trump administration begin to think through its plan for the federal government.

Vice President-elect Mike Pence signed the document, as did the White House chief-of-staff Denis McDonough. A huge part of the agreement is ensuring the confidentiality of government secrets and processes.

"The president has identified a smooth transition to the next administration as a key priority for his final year in office," said White House spokesman Brandi Hoffine. "Accordingly, administration officials across the government have been preparing for months to welcome the incoming administration and deliver to them the materials and resources they need to hit the ground running,"

"The president-elect's team has now completed the necessary steps for an initial group of authorized individuals to begin receiving briefings and other materials from our transition teams at select agencies across the government. We expect to receive additional names for a wider range of agencies from the President-elect's team as the transition work continues, and we will facilitate those requests on a rolling basis."

The delay in completing the MOU stemmed from the leadership shake-up on the Trump transition team, when its former leader, Gov. Chris Christie, was sidelined last Friday. This turmoil stalled the transition efforts for roughly one week and prevented the Trump team from getting in touch with federal agency officials, or even visiting the buildings.

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Trump transition to announce point people for USDA, EPA by Wednesday [Back](#)

By Catherine Boudreau | 11/17/2016 12:27 PM EDT

President-elect Donald Trump's transition team will announce the people leading the hand-off efforts for the Agriculture Department and other domestic policy agencies by Wednesday, Republican National Committee chief strategist Sean Spicer said on a conference call today.

The transition team [announced](#) Wednesday night that it will require incoming officials to terminate their lobbying registrations and agree not to lobby again for five years after leaving the administration. The move created uncertainty around whether Michael Torrey, the original point man for USDA, would keep his post.

"What's crucial to understand is that instead of looking back, [this policy] is looking forward," said Spicer, adding that they want to make sure people leaving administrative posts can't use their service to enrich themselves.

Torrey, who has lobbied for entities like Little Caesars, Dean Foods and the American Beverage Association as recently as September, presumably could retain his position leading the USDA changeover as long as he terminates his lobbying registration and submits written evidence to Trump's transition team as soon as possible.

The people leading the transitions at the departments of Interior, Energy, Labor, Health and Human Services, the EPA and others also will be announced by Wednesday.

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Trump's lobbying ban sends chill through K Street [Back](#)

By Andrew Restuccia | 11/17/2016 09:46 AM EDT

Trump's new [lobbying restrictions](#) sent a shockwave through Washington's vast network of professional influencers.

While Trump first proposed the five-year lobbying ban during his now-famous "drain the swamp" speech in October, few expected him to actually follow through on the pledge — which is more stringent than Obama's lobbying restrictions. Obama banned administration officials from contacting their former agency for two years, but they could still lobby other parts of the government.

People familiar with the transition said Trump aides were infuriated by [stories](#) detailing the many lobbyists on the transition. After taking control of the transition from New Jersey Gov. Chris Christie, Vice President-elect Mike Pence and other Trump aides insisted on making good on their five-year ban.

But Democrats and Republicans alike warn that the ban could compound Trump's problems recruiting top-tier talent. And they say it will discourage lobbyists from formally registering to avoid having to comply with the rule.

"It will only incent further motivation to avoid having to register as a dreaded lobbyist," one Democratic lobbyist said.

Washington saw a wave of lobbying de-registrations in the run-up to Obama's presidency, with the influence sector worrying that they'd be passed over for jobs. Similarly, officials leaving the administration have taken advantage of federal rules requiring people to register as lobbyists only if lobbying makes up 20 percent of their activity.

Norm Eisen, the former chief ethics lawyer in the Obama White House, called the rules a "good start," but he said they need to be expanded to avoid potential loopholes and cover all people with potential conflicts of interest — whether they're registered or not. Eisen met with Christie's transition aides to discuss the proposal, even proposing a draft executive order on the issue.

"And if the president elect is truly serious about 'draining the swamp,' he must do more, like dealing with his own profound conflicts of interest by establishing a true blind trust for his businesses, and stopping the gusher of campaign cash that has flooded the swamp," he added.

Trump, in his October campaign speech, called for changing the definition of lobbying to "close all the loopholes that former government officials use by labeling themselves consultants and advisers when we all know they are lobbyists."

Still, many Republicans welcomed the five-year ban.

"It allows people to choose between serving America and serving themselves," said George David Banks, a former George W. Bush environmental aide and Trump supporter. "Sure, it will limit the number of people who are in the mix. But I don't think it will have a significant impact on the number of good people who want to serve the Republic."

Trump's lobbying announcement came after days of uncertainty about how the transition would deal with lobbyists. Trump aides originally [told reporters](#) that Pence ordered the removal of all lobbyists from the team. That was news to the lobbyists on the transition, which as of yesterday had not been asked to leave.

Indeed, Trump's code of ethics requires that lobbyists de-register in order to stay on the team. That's likely to put the lobbyists on the transition, who have no guarantee of getting a job in the administration, in a bind. Do they give up their lucrative clients for the opportunity to help shape Trump's administration? So far, the lobbyists on the team have not responded to POLITICO's questions about whether they will de-register. Lobbyists on the team said they were surprised by Wednesday night's announcement.

The Trump transition's efforts to detail its code of ethics brings the operation one step closer to being able to enter federal agencies to plot the handoff of power, a process that was delayed for several days while Obama administration officials waited for Pence to sign a memorandum of understanding. The transition still needs to publicly announce members of the so-called "landing teams" that will work with the agencies. Aides said they will begin announcing members of the teams on Thursday.

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Brady says tax reform will be deficit-neutral [Back](#)

By Brian Faler | 11/15/2016 02:40 PM EDT

House Ways and Means Committee Chairman [Kevin Brady](#) predicted tax reform will happen next year, and said the plan he's working on is designed to be deficit-neutral.

"Tax reform is going to happen in 2017," he said today at a tax conference sponsored by Bloomberg BNA and KPMG. "We're designing this to break even."

"We're already in the ballpark [of neutrality] with the blueprint — I feel comfortable where we're at," he said.

Brady said he couldn't lay out a timeline for action next year, such as when his committee would act or when the entire House would vote. That's still to be determined, Brady said.

Asked about the possibility of financing a major infrastructure package with revenue raised by reform, he said: "I have not seen the details of the package being developed by the Trump administration — I think it's under construction as we speak right now and so we'll have that discussion."

Diverting revenue to pay for highways would leave less for reducing tax rates, which Brady alluded to, saying, "in our blueprint, we applied those revenues to more growth and more competitive rates."

Brady also said he's not interested in reviving a rump group of tax extenders in a lame-duck session of Congress, and expressed hope a President Donald Trump would kill the Obama administration's recently released "earnings stripping" regulations.

"I'm hopeful that he stops those regulations cold because, while the revised regulations are better than the proposed ones initially, they are still damaging to the economy."

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Hatch suggests extenders unlikely in lame duck [Back](#)

By Nick Juliano | 11/16/2016 02:16 PM EDT

Senate Finance Committee Chairman [Orrin Hatch](#) today said Republicans were not enthusiastic about extending temporary tax breaks before the end of the year, further dampening the prospects for energy incentives left out of a larger deal last year.

"I don't know" whether tax extenders legislation will come up in the lame-duck session, Hatch told reporters this afternoon. "I don't think the leader is very excited about having tax extenders, and I'm not either."

Supporters of microturbines, fuel cells and other clean energy technologies have been pushing to renew their tax credits, which were omitted from last year's wind and solar tax credit extensions. But their chances of success has diminished significantly since President-elect Donald Trump's victory last week, which elevated overall tax reform as a top priority for the incoming Congress.

House Ways and Means Chairman [Kevin Brady](#) said Tuesday that he also was [not interested](#) in passing a tax extenders bill this year.

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America's First All-Renewable-Energy City [Back](#)

By Colin Woodard | 11/17/2016 08:12 PM EDT

To understand what makes Burlington unlike almost any other city in America when it comes to the power it consumes, it helps to look inside the train that rolls into town every day. The 24 freight cars that pull up to the city's power plant aren't packed with Appalachian coal or Canadian fuel oil but wood. Each day 1,800 tons of pine and timber slash, sustainably harvested within a 60-mile radius and ground into wood chips, is fed into the roaring furnaces of the McNeil Generating Station, pumping out nearly half of the city's electricity needs.

Much of the rest of what Burlington's 42,000 citizens need to keep the lights on comes from a combination of hydroelectric power drawn from a plant it built a half mile up the Winooski River, four wind turbines on nearby Georgia Mountain and a massive array of solar panels at the airport. Together these sources helped secure Burlington the distinction of being the country's first city that draws 100 percent of its power from renewable sources. The net energy costs are cheap enough that the city has not had to raise electric rates for its customers in eight years. And Burlington is not done in its quest for energy conservation. Add in the city's plan for an expansive bike path, a growing network of electric vehicle charging stations and an ambitious plan to pipe the McNeil station's waste heat to warm downtown buildings and City Hall's goal to be a net zero consumer of energy within 10 years starts looking achievable.

The environmental sustainability revolution has spread to other sectors of civic life. Outside the gates, farmers, community gardeners and food-minded social workers tend fields and plots spread out over 300 acres of once-neglected floodplain just two miles from the city's center. Together the agricultural enterprises in the valley—working land controlled by a non-profit that partners with the city—grow \$1.3 million in food each year, much of it sold at a massive, member-owned cooperative supermarket, its own origins traced back to City Hall.

How did this former logging port on the shore of Lake Champlain transform itself over the past 40 years from a torpid manufacturing town in the far corner of a backwater state to a global trendsetter in sustainable development and green power? The answer carries particular resonance at a time when the United States' commitment to environmental issues and addressing climate change is suddenly less certain than at any time in a decade. Cities like Burlington, the largest city in a state whose tourism and agriculture dependent economy is vulnerable to climate change, have had to craft their own solutions to address global warming and to insulate themselves from the vagaries of global energy markets. In Burlington, however, these solutions were not spearheaded by civic or corporate leaders, as is now often the case when cities tackle urban issues. Instead, Burlington is achieving its energy independence almost entirely through initiatives developed by its municipal government—a government that has been decidedly left-leaning for decades. In fact, one of the people most responsible for setting in motion the chain of policies and programs that now distinguish Burlington was a ground-breaking social democratic mayor with unruly hair, a thick Brooklyn accent and a message that would many years later carry him deep into the 2016 presidential campaign.

"There's nothing magical about Burlington," says Taylor Ricketts of the University of Vermont's Gund Institute for Ecological Economics. "We don't have a gift from nature of ample sun or mighty winds or powerful rivers, so if we can do it, so can others."

Founded by the raucous revolutionary bad boy Ethan Allen and his brothers in the 1770s, Burlington grew from village to city in the mid-19th century on the strength of the timber trade,. The forests of Quebec, the Green Mountains and the Adirondacks were close at hand by lake and river, the markets of Montreal and New York City were reachable by canals and the St. Lawrence river. By 1870, the Burlington waterfront was a tangle of lumberyards, warehouses and furniture factories. Dams and woolen mills were popping up along the fast moving Winooski River, attracting waves of immigrants, first from Ireland and later Quebec. Early 20th century Burlington was a working class city of 25,000 with a college on the hill, the future University of Vermont.

But by the middle of the 20th century Burlington's growth had plateaued. That's when an ad campaign that branded the state as "the Beckoning Country" of unspoiled natural and civic

beauty began to attract disaffected city dwellers looking for an escape from the turbulence of an era defined by the Vietnam war, political assassinations, urban unrest, Watergate and gas shortages. Some of these newcomers were "back to the landers." Some who were eligible for the draft liked northern Vermont's proximity to Canada. Not a few, lacking the cash to buy one of Vermont's rundown dairy farms, pooled resources with friends and established communes. Thousands more were satisfied with bourgeois life, but wanted to do it in a safer, healthier environment.

"They'd advertised the state as pristine and untouched, and there was a public perception that true democracy still lived in Vermont, with its town meetings," says Amanda Gustin of the Vermont Historical Society. "It didn't necessarily match the reality, but people had the perception that this was a place where people could get away from the problems of wider society and get back to the land." Because many who came were from college-educated middle class and upper middle class backgrounds—and had engaged in social justice organizing before their arrival—they would have an outsized effect on the state's political trajectory generally and its largest city in particular.

One of the tens of thousands who put down roots in Burlington in this era was a struggling 29-year-old Brooklyn native named Bernie Sanders, who'd cut his teeth in social activism fighting housing discrimination at the University of Chicago. Sanders had first come to Vermont in 1964, spending two summers with his first wife in a converted maple sugar shack near Montpelier. They divorced and he spent the next three years in a hamlet in the state's remote, idyllic Northeast Kingdom with the mother of his only child. In 1971, Sanders was campaigning for one public office after another, living in a bleak Burlington apartment, surviving by writing freelance articles for an alternative newspaper and on electricity he borrowed with an extension cord from his neighbors. He ran for the U.S. Senate and governor in 1972, again for Senate in 1974 and governor in 1976. His message—the same one you heard on the 2016 campaign trail—never got him more than 6 percent of the statewide vote, but at some point Sanders noticed he was doing best in Burlington itself. He decided to run for mayor in 1981 and, buoyed by an 80-percent share of voters under 36, he defeated the five-term conservative Democratic incumbent, Gordon Paquette, by 10 votes. "It was a coalition that included students and professors, but also working class people, neighborhood activists, and environmentalists," recalls Peter Clavelle, who joined Sanders's administration and succeeded him as mayor. "And the fundamental basis of it was that government can better serve our needs and respond to the challenges of our community."

In 1983, voters re-elected Sanders by 22 points in a three-way race and turned many of his council adversaries out of office. That's when planning for what we'd later come to call sustainability got underway through a new government department, the Community and Economic Development Office, which focused on developing the city's assets, from local small businesses to the natural environment. "It's not rocket science," says Bruce Seifer, a founding staffer who moved to Burlington from New York in 1973 and would later run the department. "We asked the community what they wanted and then we gave it to them."

Self-sufficiency and environmental protection were key goals, and the Sanders administration came into office with a head start. Under Paquette, the city-owned Burlington Electric Department decided to replace its aging coal-fired power plant on the lakefront with a wood-fired one in the Intervale, a neglected stretch of Winooski River floodplain where the last dairy farmer was surrounded by junkyards. Completed during Sanders' first term, the McNeil biomass plant could use local wood to generate nearly all of the city's needs (though half the power—then and now—is owned by the plant's minority stakeholders and winds up in other towns.) The

Burlington Environmental Alliance opposed it with pen-and-ink posters of a clear-cut landscape under the words "The Wood Chip Plant is Coming." But the plant opened with a staff of full-time foresters charged with developing green rules and protocols for their suppliers. "To this day there are no sustainable harvesting standards in the State of Vermont except for ours," says Burlington Electric's chief forester Betsy Lesnikoski, who has been monitoring harvests at the plant for 33 years. "We invented the wheel."

The city's development office pushed forward on multiple fronts, helping establish a non-profit corporation that promoted energy savings in the city's public and commercial buildings; bike paths along the previously inaccessible waterfront to reduce automobile use; curbside recycling pick-up well ahead of its time; and restoring buildings as business incubators.

"A lot of communities are 'whale hunters,' they think the answer is to business recruitment is to go after the big fish," Seifer says. "Instead we created a loan fund and helped local businesses and non-profits get started, places that would reinvest their time and effort locally, hire from within, serve on boards, and when times are tough not move out of state because they live here." Ironically, much of the money supporting many of these 1980s initiatives came via federal grants awarded under Ronald Reagan's administration.

One day in 1987, an idealistic entrepreneur called on City Hall. Will Raap moved to Burlington from the San Francisco Bay area the week Sanders had been elected and had spent the previous six years building Gardener's Supply, which sold people the things they needed to grow their own food at home. While planting vegetables at his plot in the city-owned community gardens in the Intervale, Raap discovered how remarkable the floodplain soil was and decided to move his business to an abandoned pig slaughterhouse across the road from the new McNeil power station.

"I'd asked myself: Could we be a big catalyst for food being grown in farms in Burlington for Burlington?" recalls Raap, whose company began testing various crops outside their new digs. "There was no demand for local food then—you could grow it but you couldn't sell it—so the question was how could you create a hub that could take this abused land and put it in production to educate and support the next generation of farmers while simultaneously building a market place?" That, he told Sanders's officials, required a partnership with the city. "We gave Bernie three choices: use waste heat from McNeil to heat 100 acres of greenhouses; start a market garden and see if it makes sense financially; or help us make 100,000 tons of compost to restore fertility to the valley," he recalls. "Bernie chose the third one and gave us a \$7,000 loan." Tens of thousands of tons of yard and leaf waste started flowing to Intervale fields instead of the landfill.

Two decades on, the non-profit Raap set up presides over 350 acres of reclaimed agricultural land that's home to a dozen farms, from established growers to novice farmers taking advantage of low-rent farm "incubator" land. There's the community gardens, a 600-member community-supported agriculture operation (the kind where you buy shares and get weekly boxes of harvested food in exchange), a nursery for growing riverfront buffer trees, and the Intervale Food Hub, where boxes are loaded for delivery to people at their place of work or to 150 families identified by social service agencies as being in need. Together they produce \$1.3 million in foodstuffs for the Burlington market annually and provide 30,000 pounds of fresh food to families in need. "If we're going to make the world a better place, if you can get food right, then you can get the environment and economic development and human health right," says executive director Travis Marcotte, who grew up on a dairy farm a few miles south of the city. "Burlington would be very different if we hadn't had this here, creating opportunity and familiarity with sustainable agriculture."

Sanders stepped down in 1989 to run for Congress, and voters replaced him with the development office's head, Peter Clavelle. A native and former city manager of the neighboring mill-town of Winooski, Clavelle's administration would push the sustainability drive to a new level. In his first term the city instituted mandatory recycling, fought off big box stores at a proposed mall, and got an \$11.2-million bond passed to pay for insulation and other energy efficiency improvements in homes, businesses and public buildings. This initiative prevented the need to buy power from Hydro Quebec, whose dams were controversial because they flooded tribal lands in Quebec's far north, all with public support. "The beautiful thing is that we do as a general rule see the common good as a fundamental component of life here," observes Jennifer Green, the city's sustainability coordinator. "We all have to give a little for everybody to get some."

But Clavelle got ahead of the electorate on another front—extending benefits to the domestic partners of city employees—and it cost him. "Today it's hard to imagine it was an issue, but in 1993 it was," he recalls. Conservatives turned out to vote in huge numbers; Clavelle's coalition complacently stayed home. "So I lost an election and at the time I said, 'I'm done with politics, I'm done with Burlington.' I packed up my family, and we moved away for a voter-inspired sabbatical," he says. They ended up on Grenada, the Caribbean island nation with a comparable surface area and population to metropolitan Burlington. "When you're on an island, you really see what practices are sustainable and what practices aren't," he says, recalling ships unloading frozen chicken and orange juice while island chickens had little access to the market and citrus fruit rotted in the groves. "That was a transformational moment for me."

He returned to Burlington, got re-elected in 1995, and oversaw the process of developing the Legacy Plan, a citizen-sourced vision for how Burlington could become a sustainable community. "What is sustainable development? Is it the most overused buzzword of the 1990s or is it the most important concept for the survival of our planet and our communities," he says. "I decided a long time ago that its both, and that we need to go beyond the branding and rhetoric and create actual examples that will resonate and make a difference in people's lives." The plan, completed in 2000, created the guiding vision that has been followed since: integrating local business development and farm-to-table efforts, putting New Urbanist solutions ahead of sprawl and prioritizing multi-modal transport over highways. The plan also had a major environmental component that emphasized recycling, energy conservation and investment in non-polluting transportation and renewable power. "This was the visionary document," says Green, who was hired to implement it. "It got the big city departments all focused on taking this on."

And without even quite noticing itself, the city built its way toward a sustainability milestone that would turn heads worldwide.

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Tidy it is, and also financially effective. Built by private developers on Burlington-owned land in neighboring Winooski, the city exercised a onetime option to buy the facility in 2014 via a \$12-million voter-approved bond. The plant was, in a sense, free. The bond payments were about the same as the cost of the power the Burlington Electric Department would otherwise have had to purchase elsewhere. The cost of the power was now insulated from the fluctuations in oil and gas markets, prompting the Moody's credit agency to raise the utility's credit rating. And it made the city the first in the nation to obtain all of its power from renewable sources, a distinction that went almost unnoticed at the time, relegated to the third paragraph of the *Burlington Free Press's* story on the city finalizing the dam's purchase. "This was the product of a long term vision and a sequence of mayors," says Ricketts at the Gund Institute. "It kind of snuck up on us."

Indeed, because Burlington owns its own utility with its own citywide grid, the city could theoretically close its three connections with the wider world and generate all of its power combining McNeil, Winooski One, wind turbines and solar panels. This led a visiting writer for *Orion* magazine to declare this was where she would move to wait out a zombie apocalypse. This would only be an apocalyptic measure, as half of McNeil's power is actually owned by the plant's minority owners. Burlington makes up for this by buying hydro power from further afield, but it is still able to operate a renewable grid without asking rate payers to pay extra for it. "The conventional wisdom is that you have to pay more for renewables, but it's not true," says Burlington Electric's general manager, Neale Lunderville. "We haven't raised rates in eight years."

One of the reasons rates are low is that the city and its co-owners eight years ago invested \$11.5 million in a state-of-the-art air scrubber that qualified the plant to earn the highest value renewable energy credits. They're able to sell those to out-of-state utilities (who need to meet their standards but lack clean generating stations of their own) and then—to meet their own renewable standards—buy back cheaper credits to cover the power. The net profit—\$6 to \$9 million a year—is used to offset the rates Burlington Electric charges customers. "It's a terrific model for cities across the country," says Sandra Levine, senior attorney at the Conservation Law Foundation's Montpelier office. "With the challenges of climate change, we should be looking to our electricity sector to move away from fossil fuels and this is a good way to do it."

Current mayor Miro Weinberger, a Democrat elected in 2012, was inspired by the international attention Burlington has received since achieving the renewable energy milestone. "It's really pushed us to think hard and big about where we go from here," he says. "That's when we started looking at what net zero would look like."

A city is considered net zero when it generates as much energy as it consumes, not just in the form of electricity, but heat and transportation as well. Achieving such a state, Weinberger argues, would further insulate Burlington from the volatility of fossil fuel markets, saving money and luring more entrepreneurs and businesses with brands linked to sustainability, such as Ben & Jerry's ice cream, green cleaning products maker Seventh Generation and climate change-conscious Burton Snowboards. "We've got our own goals around eliminating our carbon footprint completely, and being based in a city where that's easily possible is very important to us," says Joey Bergstein, general manager at Seventh Generation, which started in the early 1980s as an off-shoot of Gardener's Supply. "Our history here is very much driven by the fact that the city and the state of Vermont are so aligned with our values."

Proposals to use the waste steam from the McNeil plant to heat buildings and businesses have been kicking around for a quarter century, but ran against an economic obstacle. Building the distribution system is a big upfront cost, but attracting users from existing homes and buildings is a slow undertaking. What was needed was the equivalent of an anchor store at a mall, a big new

user ready to buy lots of heat from day one, preferably downtown so that additional users could be easily patched in as their existing boilers reached replacement age. Now it looks like that's happening. On November 9, city voters approved a 14-story, multi-use development that will replace a dying indoor mall, that now cuts off several central streets, with a sidewalk-friendly restaurants and retail and market and affordable apartments.

At the city-owned airport, they've reduced demand for heat and electricity by replacing lighting and air conditioning systems and properly insulating the terminal's roof. There's a 500-kilowatt solar array that's been providing enough power to supply 60 homes and a rain garden on the roof of the parking garage. (A 10-megawatt wind farm from which the city draws power can be seen on a nearby ridge.) "We're a small airport and we don't have a lot of money, but what we try to do is to introduce a greener way whenever we change a bulb, replace a window, or repair our roof in a way that gives us a greater energy savings and return on our investment over time," says city aviation director Gene Richards, who cut electricity usage at the airport by a fifth in three years. Popular local restaurants have taken over the concessions in the terminal as part of the buy local effort. "We're tearing down the walls in this community to leverage our assets and make it work."

Achieving net zero in transportation is thornier than heating and power because there are few big users to focus on and only a handful of users have invested in all-electric vehicles. "There's the range anxiety with electric vehicles—can I go far enough?—so having enough well-placed charging stations is really helpful," says Lunderville of Burlington Electric, which has deployed 10 multiple-outlet charging stations at strategic locations around the city—parking garages, city hall, the co-op grocery store and the University of Vermont campus—and plans to add five to six annually. They're looking at a pilot project for city buses, while Mayor Weinberger's office just released a detailed plan for greatly expanding the bike path network with protected lanes. "The stats show the existence of protected lanes increases usage by 300 to 500 percent because there are a whole lot of people who don't feel safe co-mingled with vehicles," says Weinberger, who was inspired by a biking weekend in Montreal, which has such a system. "Seeing what they've done convinced me of the value of a more systematic approach."

Burlington Electric is preparing for a challenge of its own: Its grid is expected to shift from a "hub-and-spoke" system of power plants and consumers to a distributed network with thousands of tiny producers and storage sites. "The changes are being driven by the customers, who didn't use to have the option to do their own solar panels or start storing their energy with a Tesla battery pack"—a home battery system that allows users to bank electricity, says Lunderville. He envisions creating a system by which the utility could pay customers to store energy for the network at times when they don't need it banked themselves. To do that requires the grid to collect and process a lot more data to coordinate the cacophony of demands, supplies and storage opportunities. "Suddenly we need to know a lot more about how power is being generated and used than you do today."

The industry expects these changes everywhere, but Burlington is likely to see them early—because of its green ethos and because Vermont offers a variety of incentives for customers to invest in solar. But it's also the perfect sandbox—a small city that owns its own grid, power generation and public fiber-optic data network—and the utility is ready to pioneer the development of the technology and policies to make it all work. "Having the fiber optics in place is really critical to moving toward this bi-directional energy grid," says energy consultant Gabrielle Stebbins, who previously headed the state's renewable energy industry association. "We're a small state and city, so we're not driving the bus. But the little motor car we're driving can tell which roads are possible and feasible."

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America's First All-Renewable-Energy City [Back](#)

By Colin Woodard | 11/17/2016 08:12 PM EDT

To understand what makes Burlington unlike almost any other city in America when it comes to the power it consumes, it helps to look inside the train that rolls into town every day. The 24 freight cars that pull up to the city's power plant aren't packed with Appalachian coal or Canadian fuel oil but wood. Each day 1,800 tons of pine and timber slash, sustainably harvested within a 60-mile radius and ground into wood chips, is fed into the roaring furnaces of the McNeil Generating Station, pumping out nearly half of the city's electricity needs.

Much of the rest of what Burlington's 42,000 citizens need to keep the lights on comes from a combination of hydroelectric power drawn from a plant it built a half mile up the Winooski River, four wind turbines on nearby Georgia Mountain and a massive array of solar panels at the airport. Together these sources helped secure Burlington the distinction of being the country's first city that draws 100 percent of its power from renewable sources. The net energy costs are cheap enough that the city has not had to raise electric rates for its customers in eight years. And Burlington is not done in its quest for energy conservation. Add in the city's plan for an expansive bike path, a growing network of electric vehicle charging stations and an ambitious plan to pipe the McNeil station's waste heat to warm downtown buildings and City Hall's goal to be a net zero consumer of energy within 10 years starts looking achievable.

The environmental sustainability revolution has spread to other sectors of civic life. Outside the gates, farmers, community gardeners and food-minded social workers tend fields and plots spread out over 300 acres of once-neglected floodplain just two miles from the city's center. Together the agricultural enterprises in the valley—working land controlled by a non-profit that partners with the city—grow \$1.3 million in food each year, much of it sold at a massive, member-owned cooperative supermarket, its own origins traced back to City Hall.

How did this former logging port on the shore of Lake Champlain transform itself over the past 40 years from a torpid manufacturing town in the far corner of a backwater state to a global trendsetter in sustainable development and green power? The answer carries particular resonance at a time when the United States' commitment to environmental issues and addressing climate change is suddenly less certain than at any time in a decade. Cities like Burlington, the largest city in a state whose tourism and agriculture dependent economy is vulnerable to climate change, have had to craft their own solutions to address global warming and to insulate themselves from the vagaries of global energy markets. In Burlington, however, these solutions were not spearheaded by civic or corporate leaders, as is now often the case when cities tackle urban issues. Instead, Burlington is achieving its energy independence almost entirely through initiatives developed by its municipal government—a government that has been decidedly left-leaning for decades. In fact, one of the people most responsible for setting in motion the chain of policies and programs that now distinguish Burlington was a ground-breaking social democratic mayor with unruly hair, a thick Brooklyn accent and a message that would many years later carry him deep into the 2016 presidential campaign.

"There's nothing magical about Burlington," says Taylor Ricketts of the University of Vermont's Gund Institute for Ecological Economics. "We don't have a gift from nature of ample sun or mighty winds or powerful rivers, so if we can do it, so can others."

Founded by the raucous revolutionary bad boy Ethan Allen and his brothers in the 1770s, Burlington grew from village to city in the mid-19th century on the strength of the timber trade,. The forests of Quebec, the Green Mountains and the Adirondacks were close at hand by lake and river, the markets of Montreal and New York City were reachable by canals and the St. Lawrence river. By 1870, the Burlington waterfront was a tangle of lumberyards, warehouses and furniture factories. Dams and woolen mills were popping up along the fast moving Winooski River, attracting waves of immigrants, first from Ireland and later Quebec. Early 20th century Burlington was a working class city of 25,000 with a college on the hill, the future University of Vermont.

But by the middle of the 20th century Burlington's growth had plateaued. That's when an ad campaign that branded the state as "the Beckoning Country" of unspoiled natural and civic beauty began to attract disaffected city dwellers looking for an escape from the turbulence of an era defined by the Vietnam war, political assassinations, urban unrest, Watergate and gas shortages. Some of these newcomers were "back to the landers." Some who were eligible for the draft liked northern Vermont's proximity to Canada. Not a few, lacking the cash to buy one of Vermont's rundown dairy farms, pooled resources with friends and established communes. Thousands more were satisfied with bourgeois life, but wanted to do it in a safer, healthier environment.

"They'd advertised the state as pristine and untouched, and there was a public perception that true democracy still lived in Vermont, with its town meetings," says Amanda Gustin of the Vermont Historical Society. "It didn't necessarily match the reality, but people had the perception that this was a place where people could get away from the problems of wider society and get back to the land." Because many who came were from college-educated middle class and upper middle class backgrounds—and had engaged in social justice organizing before their arrival—they would have an outsized effect on the state's political trajectory generally and its largest city in particular.

One of the tens of thousands who put down roots in Burlington in this era was a struggling 29-year-old Brooklyn native named Bernie Sanders, who'd cut his teeth in social activism fighting housing discrimination at the University of Chicago. Sanders had first come to Vermont in 1964, spending two summers with his first wife in a converted maple sugar shack near Montpelier. They divorced and he spent the next three years in a hamlet in the state's remote, idyllic Northeast Kingdom with the mother of his only child. In 1971, Sanders was campaigning for one public office after another, living in a bleak Burlington apartment, surviving by writing freelance articles for an alternative newspaper and on electricity he borrowed with an extension cord from his neighbors. He ran for the U.S. Senate and governor in 1972, again for Senate in 1974 and governor in 1976. His message—the same one you heard on the 2016 campaign trail—never got him more than 6 percent of the statewide vote, but at some point Sanders noticed he was doing best in Burlington itself. He decided to run for mayor in 1981 and, buoyed by an 80-percent share of voters under 36, he defeated the five-term conservative Democratic incumbent, Gordon Paquette, by 10 votes. "It was a coalition that included students and professors, but also working class people, neighborhood activists, and environmentalists," recalls Peter Clavelle, who joined Sanders's administration and succeeded him as mayor. "And the fundamental basis of it was that government can better serve our needs and respond to the challenges of our community."

In 1983, voters re-elected Sanders by 22 points in a three-way race and turned many of his council adversaries out of office. That's when planning for what we'd later come to call sustainability got underway through a new government department, the Community and Economic Development Office, which focused on developing the city's assets, from local small businesses to the natural environment. "It's not rocket science," says Bruce Seifer, a founding

staffer who moved to Burlington from New York in 1973 and would later run the department. "We asked the community what they wanted and then we gave it to them."

Self-sufficiency and environmental protection were key goals, and the Sanders administration came into office with a head start. Under Paquette, the city-owned Burlington Electric Department decided to replace its aging coal-fired power plant on the lakefront with a wood-fired one in the Intervale, a neglected stretch of Winooski River floodplain where the last dairy farmer was surrounded by junkyards. Completed during Sanders' first term, the McNeil biomass plant could use local wood to generate nearly all of the city's needs (though half the power—then and now—is owned by the plant's minority stakeholders and winds up in other towns.) The Burlington Environmental Alliance opposed it with pen-and-ink posters of a clear-cut landscape under the words "The Wood Chip Plant is Coming." But the plant opened with a staff of full-time foresters charged with developing green rules and protocols for their suppliers. "To this day there are no sustainable harvesting standards in the State of Vermont except for ours," says Burlington Electric's chief forester Betsy Lesnikoski, who has been monitoring harvests at the plant for 33 years. "We invented the wheel."

The city's development office pushed forward on multiple fronts, helping establish a non-profit corporation that promoted energy savings in the city's public and commercial buildings; bike paths along the previously inaccessible waterfront to reduce automobile use; curbside recycling pick-up well ahead of its time; and restoring buildings as business incubators.

"A lot of communities are 'whale hunters,' they think the answer is to business recruitment is to go after the big fish," Seifer says. "Instead we created a loan fund and helped local businesses and non-profits get started, places that would reinvest their time and effort locally, hire from within, serve on boards, and when times are tough not move out of state because they live here." Ironically, much of the money supporting many of these 1980s initiatives came via federal grants awarded under Ronald Reagan's administration.

One day in 1987, an idealistic entrepreneur called on City Hall. Will Raap moved to Burlington from the San Francisco Bay area the week Sanders had been elected and had spent the previous six years building Gardener's Supply, which sold people the things they needed to grow their own food at home. While planting vegetables at his plot in the city-owned community gardens in the Intervale, Raap discovered how remarkable the floodplain soil was and decided to move his business to an abandoned pig slaughterhouse across the road from the new McNeil power station.

"I'd asked myself: Could we be a big catalyst for food being grown in farms in Burlington for Burlington?" recalls Raap, whose company began testing various crops outside their new digs. "There was no demand for local food then—you could grow it but you couldn't sell it—so the question was how could you create a hub that could take this abused land and put it in production to educate and support the next generation of farmers while simultaneously building a market place?" That, he told Sanders's officials, required a partnership with the city. "We gave Bernie three choices: use waste heat from McNeil to heat 100 acres of greenhouses; start a market garden and see if it makes sense financially; or help us make 100,000 tons of compost to restore fertility to the valley," he recalls. "Bernie chose the third one and gave us a \$7,000 loan." Tens of thousands of tons of yard and leaf waste started flowing to Intervale fields instead of the landfill.

Two decades on, the non-profit Raap set up presides over 350 acres of reclaimed agricultural land that's home to a dozen farms, from established growers to novice farmers taking advantage

of low-rent farm "incubator" land. There's the community gardens, a 600-member community-supported agriculture operation (the kind where you buy shares and get weekly boxes of harvested food in exchange), a nursery for growing riverfront buffer trees, and the Intervale Food Hub, where boxes are loaded for delivery to people at their place of work or to 150 families identified by social service agencies as being in need. Together they produce \$1.3 million in foodstuffs for the Burlington market annually and provide 30,000 pounds of fresh food to families in need. "If we're going to make the world a better place, if you can get food right, then you can get the environment and economic development and human health right," says executive director Travis Marcotte, who grew up on a dairy farm a few miles south of the city. "Burlington would be very different if we hadn't had this here, creating opportunity and familiarity with sustainable agriculture."

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Shareholders approve Tesla, SolarCity merger [Back](#)

By Esther Whieldon | 11/17/2016 04:33 PM EDT

Shareholders of electric vehicle maker Tesla and rooftop solar company SolarCity today approved the companies' proposed merger.

Tesla CEO Elon Musk, who is also the chairman of SolarCity, is planning to combine the companies and offer an all-in-one home electricity supply and storage package. The deal also could help [ease](#) SolarCity's dependence on state-level net metering programs that are coming under attack across the country.

Excluding the votes of Musk and other shareholders who had an affiliation with SolarCity, more than 85 percent of shares were cast in favor of the corporate marriage, Tesla said. The companies expect to complete the transaction "in the coming days," Tesla said in a statement.

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Hoekstra, potential CIA pick, has long foreign, domestic lobbying resume [Back](#)

By Benjamin Oreskes | 11/16/2016 12:05 PM EDT

Former Rep. Peter Hoekstra, a potential Donald Trump pick to run the Central Intelligence Agency, previously lobbied on behalf of the Kurdish regional government, a Belarusian potash company and a Libyan organization, as well as many major U.S.-based companies.

Vice President-elect Mike Pence took control of the Trump transition effort from New Jersey Gov. Chris Christie last Friday amid reports that he is purging the team of lobbyists to square with the campaign's theme of "draining the swamp" in Washington.

During the campaign, Trump said he would issue a "lifetime ban against senior executive branch officials lobbying on behalf of a foreign government." Still, he backtracked on his opposition to lobbyists in a "60 Minutes" interviews earlier this week.

Hoekstra, who chaired the House Intelligence Committee from 2004 to 2007, has been [floated](#) repeatedly over the past week as a potential CIA chief.

But his lobbying record is extensive; he worked as a lobbyist for Greenberg Traurig and Dickstein Shapiro after leaving Congress in 2011, and then struck out on his own this year.

The Michigan Republican, who served 18 years in the House and unsuccessfully pursued both the Michigan governorship and a Senate seat, currently heads Hoekstra Global Strategies, whose clients include Oregon-based manufacturer [Columbia Helicopters](#) and Michigan-based oil production outfit [Core Energy](#), according to lobbying disclosure reports. In 2016, his company reported \$68,500 in income from the two companies. In his work before that, at Greenberg Traurig and Dickstein Shapiro, Hoekstra [lobbied](#) on behalf of multiple domestic corporations, including coal giant Peabody Energy and tobacco company [Lorillard](#) Inc., as the latter [went](#) through a \$27.4 billion merger with Reynolds American.

And like Rudy Giuliani, whose bid to become Trump's Secretary of State has prompted scrutiny of his foreign lobbying work, Hoekstra has done plenty of work for foreign clients.

Hoekstra declined to comment on media speculation about a potential nomination - or how his lobbying history might affect his chances of getting a job in the Trump administration.

"Any characterization of what's going on and who they're bringing on, that's for the transition team to talk about and not for me," Hoekstra, who is in Washington today, told POLITICO in a brief phone interview.

"I've talked to the folks at the campaign," he said. "They're going through a very complicated process. I've been impressed with what they're doing."

Hoekstra served as Trump's Michigan co-chair and advisor on national security issues during the 2016 campaign. He also said that he [participated](#) in several briefings with Trump on Middle East issues and the threat from ISIS before the election.

"He learns very quickly and he behaves exactly the way I would see a CEO behave," Hoekstra said of Trump.

After leaving Congress in early 2013 he joined Dickstein Shapiro, and [then moved](#) in August 2014 to Greenberg Traurig, which also employed Giuliani. It's there that Hoekstra's foreign lobbying took off.

Hoekstra worked on raising the Kurdish Regional Government's profile on the Hill, meeting often with his former colleagues and their staffs. The Kurdish Regional Government is the semi-autonomous governing body of the predominately Kurdish northern part of Iraq. Their armed forces, known as the Peshmerga, have been instrumental in the retaking of Mosul and the larger fight against ISIS.

He [argued](#) in the pages of the National Review that the United States must provide the Kurdish security forces - known as the Peshmerga - with weapons to defeat ISIS.

"The United States needs to immediately provide it with more than light arms and artillery to tip the scales in their favor and overcome the firepower of the Islamists," he [wrote](#).

From April 2014 to October 2015, the firm received just over [\\$260,000](#) in payments from the Kurdish Regional Government, according to Justice Department records. (Hoekstra left Greenberg Traurig in August 2015.)

The Libya Institute for Advanced Studies, an organization that's [partnered](#) with the State Department to do educational workshops in the war-torn country, also enlisted Hoekstra's services at Greenberg Traurig's services in 2015.

His goal was to "strengthen a dialogue with Members of Congress, Administration Officials and other key leaders in the United States to communicate the foundation and its leadership's interests and policies for LIAS and issues related to the security and development of Libya," according to Justice Department records.

Just after he left Greenberg, Hoekstra [published](#) a book titled "Architects of Disaster: The Destruction of Libya about the Obama administration actions in Libya."

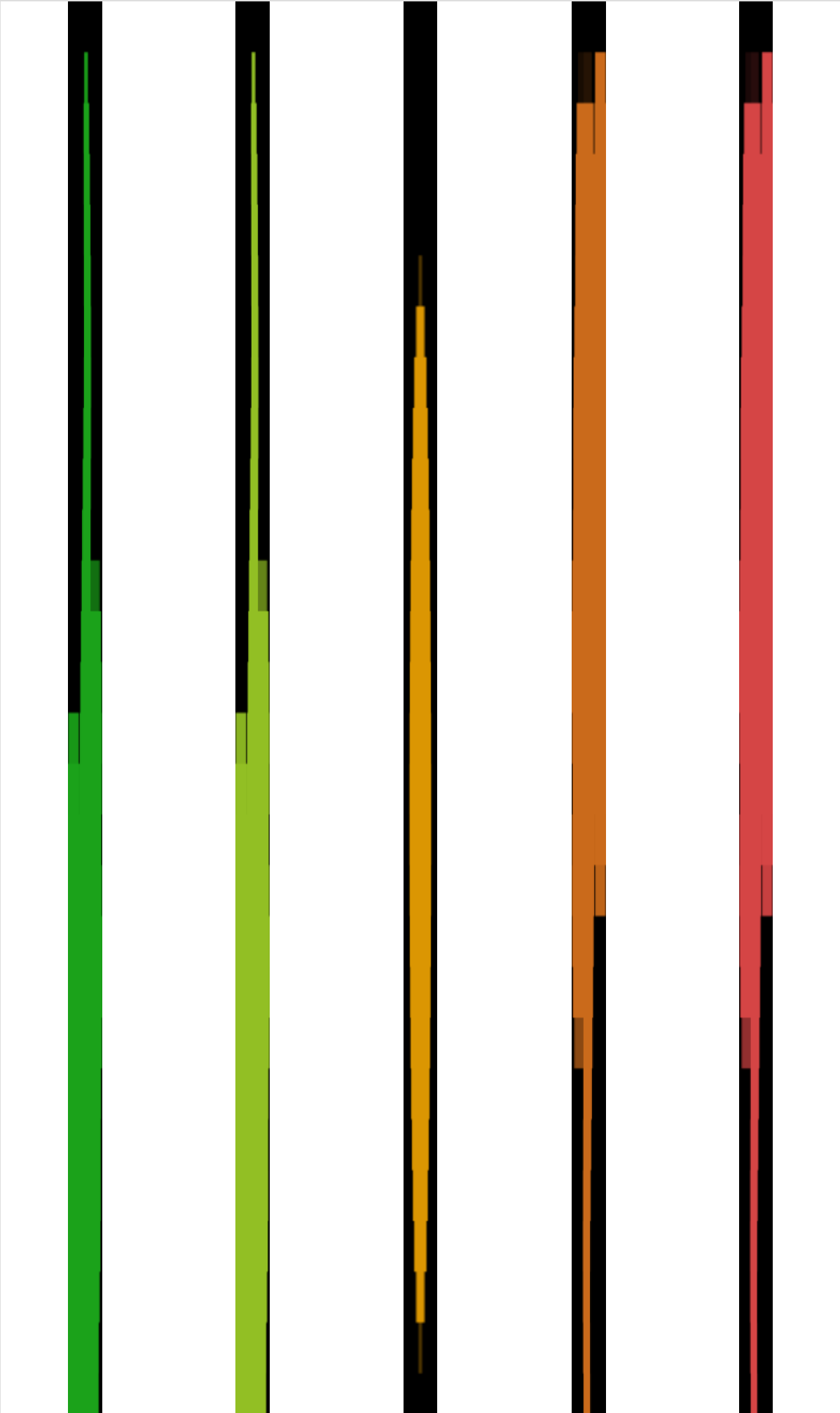
The work was roundly dismissed by White House officials. But the Heritage Foundation's James Carafano, who is working on the Trump foreign policy transition, [called](#) it "A graphic autopsy of what went wrong in Libya and why." Former GOP Nominee Mitt Romney said the book "cuts to the core in identifying how a radical Islamist agenda left to its own devices cannot reconcile with Western ideals of tolerance and acceptance."

Hoekstra also helped lobby on behalf of a Belarusian fertilizer company worried about the prospect of U.S. sanctions during his time with Greenberg Traurig. Rep. Dana Rohrabacher, a Trump supporter as well, [told POLITICO](#) earlier this year that he thought Hoekstra helped organize a meeting with half a dozen company officials when the California representative traveled to the country on a government-sponsored trip.

"We developed a very close and trusting relationship when he was in Congress and I always respected him," Rohrabacher said. "So when he recommended the meeting I, of course, took him up on the offer."

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From: Bernhardt, David L.

Sent: Monday, November 21, 2016 9:21 AM

To: Smith, Ryan A.; 'drehberg@mercuryllc.com'; Dennis Cardoza; 'Johnny Amaral'; 'ckaren@sidley.com'

Subject: No team call today

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From: Heidi Pyle
Sent: Tuesday, November 22, 2016 10:21 AM
To: 'Johnny Amaral'; 'Gayle Holman'
CC: Michael Burns; Laura Murrell
Subject: WWD Rapid Response November 22

Please see the below highlights from today's media.

For Immediate Response:

- [California Magazine: Fish Gotta Swim: But Maybe Not in the Delta](#)
 - "Fisheries advocates have long opposed the deal because it assures that Westlands will get vast quantities of water while side-stepping the toxic drainage issue."
 - "Next, Trump appointed David Bernhardt, a Westlands lobbyist, to lead the Department of Interior transition team for the new administration. U.S. Representative Devin Nunes, (R-Visalia), another avid supporter of Westlands, has been appointed to the executive committee of Trump's general transition team. Nunes is an advocate for HR 2898, a pending bill that would provide San Joaquin farmers more water, fund the construction of new reservoirs, and kill a landmark San Joaquin River restoration program that would assure year-round flows and revitalized salmon runs for the stream."
 - ""Actually, I'm not sure things will be all that much worse under Trump," says Walker. "California Democrats are in bed with powerful agricultural interests, and have not served us well on water policy. Westlands has been the tail wagging the water policy dog for years.""
 - "Walker points out that Senator Dianne Feinstein has long lobbied on behalf of Westlands and other powerful South State irrigators, and that Governor Jerry Brown is obsessed with the idea of building the Twin Tunnels, a retread of the peripheral canal, a failed diversion project Brown flogged during his first tenure as governor in the 1980s."
 - ""Western San Joaquin growers are always crying because they have some of the most junior water rights in the state, so they're the first to be cut off," says Walker. "But that's as it should be. They have no local water. The western San Joaquin is lousy farmland, full of toxic selenium that kills fish and wildlife when it drains to the San Joaquin River and the Delta. If we took the money [from the pending Westlands settlement with the Federal Government that locks in their water supply and relieves them of drainage responsibilities] we could buy out all the land in the district, retire it, end the drainage problem, and save a million acre feet of water a year. [A single acre foot is about 325,000 gallons, or about enough water to support two families for a year.]""
 - Recommendation: detailed recommendation to follow.
- [Modesto Bee: Economics of state's water grab don't add up](#)
 - "But that reliability is no less important to us. Without reliable water, farmers are stuck raising lower-value annual crops. Without reliable harvests, people working in food processing plants and wineries might not have their jobs. Will city wells be reliable when nearby farmers are forced to pump twice as much groundwater – an outcome the state says it anticipates – just to keep from going bankrupt? And who will pay to make those city wells deeper when they fail? No worry, says the state, cities can always buy water from farmers."
 - "But if farmers are selling water to cities, they're not growing crops – and that means thousands will go without jobs."
 - ""Did you consider the downstream effects" of farmers not planting lower-value crops like hay and corn? asked Bass.
"(The model) is not designed to look at forward linkages," said state economist Tom Wegge. "We worked with the info we had.""
 - Recommendation: Share to social media

Notable:

- [Water Deeply: Water Recycling May Prompt New Environmental Concerns](#)
 - "The department alleges that by diverting as much as 50,000 acre-feet (62m cubic meters) of water per year from its existing Sacramento River discharge, the district may deprive endangered salmon and

other species of important habitat. The situation puts the Sacramento district in a Catch-22, because its water recycling project is partly motivated by the protection of another species: Delta smelt.”

- “Opening arguments in the case are expected in 2017. If successful, it could require all new wastewater recycling projects in the state to conduct a “reasonable use” analysis to ensure the water they produce benefits the environment and is not wasteful. “The issue here and across the state is, you can bring all the recycled water in the world online, but that won’t help if you allow it to be used wastefully,” Weiner said.”
- [American Rivers: LETTING THE WATER FLOW IN THE SAN JOAQUIN](#)
 - “However, this isn’t a simple fish vs. farmers story. Water diversions for agriculture in the upper reaches of these rivers reduce the quantity and quality of water for downstream cities and farmers.”
 - “Not surprisingly, the political pressure on the Board is intense. That’s why American Rivers needs your help to speak for the rivers. Whether you live in California or another state, please write the California Water Board and ask them to increase flow requirements on the San Joaquin River and its tributaries!”

Best,

Heidi Pyle

KP PUBLIC AFFAIRS

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From: Philip Williams

Sent: Tuesday, November 22, 2016 2:27 PM

To: Rose Schlueter

Subject: Help

Rose, can you please send a separate email to David 'Bernhardt, Roger Martella, Cynthia 'Larsen, and Greg Scott, reminding them that I need their budget proposals for fiscal year 17 through 18 as soon as possible, but no later than cob today?

Phil

Philip A. Williams

Deputy General Counsel

Westlands Water District

Office: 916-321-4207

Cell: 931-████-████

(Sent from my iPhone)

From: Rose Schlueter
Sent: Tuesday, November 22, 2016 2:28 PM
To: 'Philip Williams'
Subject: RE: Help

Will do

From: Philip Williams [mailto:pwilliams@westlandswater.org]
Sent: Tuesday, November 22, 2016 1:27 PM
To: Rose Schlueter
Subject: Help

Rose, can you please send a separate email to David 'Bernhardt, Roger Martella, Cynthia 'Larsen, and Greg Scott, reminding them that I need their budget proposals for fiscal year 17 through 18 as soon as possible, but no later than cob today?

Phil

Philip A. Williams
Deputy General Counsel
Westlands Water District
Office: 916-321-4207
Cell: 931-■■■■-■■■■

(Sent from my iPhone)

From: Bernhardt, David L.
Sent: Wednesday, November 23, 2016 11:32 AM
To: Johnny Amaral
Subject: I'm on

David Bernhardt

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From: Johnny Amaral
Sent: Wednesday, November 23, 2016 11:32 AM
To: Bernhardt, David L.
Subject: Re: I'm on

Thanks

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

> On Nov 23, 2016, at 10:32 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

>

>

>

> David Bernhardt

>

>

>

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From: Johnny Amaral
Sent: Wednesday, November 23, 2016 11:35 AM
To: David L. Bernhardt
Subject: Fwd: Revisions to contractor proposal 11.22.16(BEW Edits).docx
Attachments: Revisions to contractor proposal 11.22.16(BEW Edits).docx; Untitled attachment 00201.htm

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

Begin forwarded message:

From: "Walthall, Brent" <bwalthall@kcwa.com>
Date: November 23, 2016 at 9:48:59 AM PST
To: Tom Birmingham <tbirmingham@westlandswater.org>, "'Patterson,Roger K'" <RPatterson@mwdh2o.com>, "dorth@davidorthconsulting.com" <dorth@davidorthconsulting.com>, "Jason Peltier" (jason.peltier@sldmwa.org)" <jason.peltier@sldmwa.org>, "'Jason R. Phillips'" <jphillips@friantwater.org>, Dan Vink <dvink@ltrid.org>, "'Jeff Sutton'" (jsutton@tccanal.com)" <jsutton@tccanal.com>, "'Steven Chedester'" (schedester@sirecwa.net)" <schedester@sirecwa.net>
Cc: "Creel, Curtis" <ccreel@kcwa.com>, "Paul Weiland" (pweiland@nossaman.com)" <pweiland@nossaman.com>, 'Johnny Amaral' <jamaral@westlandswater.org>, 'Shelley Ostrowski' <sostrowski@westlandswater.org>
Subject: Revisions to contractor proposal 11.22.16(BEW Edits).docx

Hi Everyone:

The language that John and Kyle sent to us yesterday is attached. We can accept the changes that the administration is proposing, however, we also propose two small but important edits of our own.

In section 11(a)(2)(C) we modify the language so that the Secretaries are not required to apply the provisions of this bill to future BiOps only if they determine the provision of this bill are "inconsistent" with the ESA.

and

In section 14 we add section 5(a) as a provision that survives the bill's sunset date. 5(a) is the language that includes the PWAs in future consultations.

Brent

	Draft	Comments
1.	Water Contractor Proposal of 9/22 as modified	
2.		
3.		
4.		
5.	<u>SEC. 01. DEFINITIONS.</u>	
6.		
7.	<u>In this Act:</u>	
8.		
9.	<u>(1) ASSISTANT ADMINISTRATOR.—The term “Assistant</u>	
10.	<u>Administrator” means the Assistant Administrator for Fisheries of</u>	
11.	<u>the National Oceanic and Atmospheric Administration.</u>	
12.		
13.	<u>(2) CENTRAL VALLEY PROJECT.—The term “Central</u>	
14.	<u>Valley Project” has the meaning given the term in section 3403 of</u>	
15.	<u>the Central Valley Project Improvement Act (Public Law 102–575;</u>	
16.	<u>106 Stat. 4707).</u>	
17.		
18.	<u>(3) COMMISSIONER.—The term “Commissioner” means the</u>	
19.	<u>Commissioner of Reclamation.</u>	
20.		
21.	<u>(4) DELTA.—The term “Delta” means the Sacramento-San</u>	
22.	<u>Joaquin Delta and the Suisun Marsh (as defined in section 12220 of</u>	
23.	<u>the California Water Code and section 29101 of the California</u>	
24.	<u>Public Resources Code (as in effect on the date of enactment of this</u>	
25.	<u>Act)).</u>	
26.		
27.	<u>(5) DELTA SMELT.—The term “Delta smelt” means the fish</u>	
28.	<u>species with the scientific name <i>Hypomesus transpacificus</i>.</u>	
29.		
30.	<u>(6) DIRECTOR.—The term “Director” means the Director of</u>	
31.	<u>the United States Fish and Wildlife Service.</u>	
32.		
33.	<u>(7) LISTED FISH SPECIES.—The term “listed fish species”</u>	
34.	<u>means—</u>	
35.	<u>(A) any natural origin steelhead, natural origin genetic</u>	
36.	<u>spring run Chinook, or genetic winter run Chinook salmon</u>	
37.	<u>(including any hatchery steelhead or salmon population within</u>	
38.	<u>the evolutionary significant unit or a distinct population</u>	
39.	<u>segment); and</u>	
40.	<u>(B) Delta smelt.</u>	
41.		
42.	<u>(8) RECLAMATION STATE.—The term “Reclamation State”</u>	
	<u>means any of the States of—</u>	

Formatted Table

1.	<u>(A) Arizona;</u>	
2.		
3.	<u>(B) California;</u>	
4.		
5.	<u>(C) Colorado;</u>	
6.		
7.	<u>(D) Idaho;</u>	
8.		
9.	<u>(E) Kansas;</u>	
10.		
11.	<u>(F) Montana;</u>	
12.		
13.	<u>(G) Nebraska;</u>	
14.		
15.	<u>(H) Nevada;</u>	
16.		
17.	<u>(I) New Mexico;</u>	
18.		
19.	<u>(J) North Dakota;</u>	
20.		
21.	<u>(K) Oklahoma;</u>	
22.		
23.	<u>(L) Oregon;</u>	
24.		
25.	<u>(M) South Dakota;</u>	
26.		
27.	<u>(N) Texas;</u>	
28.		
29.	<u>(O) Utah;</u>	
30.		
31.	<u>(P) Washington; and</u>	
32.		
33.	<u>(Q) Wyoming.</u>	
34.		
35.	<u>(9) SALMONID BIOLOGICAL OPINION.—</u>	
36.		
37.	<u>(A) IN GENERAL.—The term “salmonid biological</u>	
38.	<u>opinion” means the biological and conference opinion of the</u>	
39.	<u>National Marine Fisheries Service dated June 4, 2009,</u>	
40.	<u>regarding the long-term operation of the Central Valley Project</u>	
41.	<u>and the State Water Project, and successor biological opinions.</u>	
42.		
43.	<u>(B) INCLUSIONS.—The term “salmonid biological</u>	
	<u>opinion” includes the operative incidental take statement of the</u>	
	<u>opinion described in subparagraph (A).</u>	

1.	<u>(10) SMELT BIOLOGICAL OPINION.—</u>	
2.		
3.	<u>(A) IN GENERAL.—The term “smelt biological</u>	
4.	<u>opinion” means the biological opinion dated December 15,</u>	
5.	<u>2008, regarding the coordinated operation of the Central</u>	
6.	<u>Valley Project and the State Water Project, and successor</u>	
7.	<u>biological opinions.</u>	
8.	<u>(B) INCLUSIONS.—The term “smelt biological</u>	
9.	<u>opinion” includes the operative incidental take statement of the</u>	
10.	<u>opinion described in subparagraph (A).</u>	
11.		
12.	<u>(11) STATE WATER PROJECT.—The term “State Water</u>	
13.	<u>Project” means the water project described in chapter 5 of part 3 of</u>	
14.	<u>division 6 of the California Water Code (sections 11550 et seq.) (as</u>	
15.	<u>in effect on the date of enactment of this Act) and operated by the</u>	
16.	<u>California Department of Water Resources.</u>	
17.	SEC. 02. OPERATIONS AND REVIEWS.	
18.		
19.	(a) WATER SUPPLIES -- The Secretary of the Interior and Secretary of	
20.	Commerce shall provide the maximum quantity of water supplies	
21.	practicable to Central Valley Project agricultural, municipal and industrial	
22.	contractors, water service or repayment contractors, water rights	
23.	settlement contractors, exchange contractors, refuge contractors, and State	
24.	Water Project contractors, by approving, in accordance with applicable	
25.	Federal and State laws (including regulations), operations or temporary	
26.	projects to provide additional water supplies as quickly as possible, based	
27.	on available information.	
28.		
29.	(b) ADMINISTRATION. – In carrying out subsection (a), the Secretary	
30.	of the Interior and Secretary of Commerce shall, consistent with	
31.	applicable laws (including regulations) –	
32.		
33.	(l) (A) in close coordination with the California Department of	
34.	Water Resources and the California Department of Fish and	
35.	Wildlife, implement a pilot project to test and evaluate the ability to	
36.	operate the Delta cross-channel gates daily or as otherwise may be	
37.	appropriate to keep them open to the greatest extent practicable to protect	
38.	out-migrating salmonids, manage salinities in the interior Delta and any	
39.	other water quality issues, and maximize Central Valley Project and State	
40.	Water Project pumping, subject to the condition that the pilot project	
41.	shall be designed and implemented consistent with operational criteria	
42.	and monitoring criteria required by the California State Water Resources	
43.	Control Board; and	

1.		
2.	(B) design, implement, and evaluate such real-time monitoring	
3.	capabilities to enable effective real-time operations of the cross channel	
4.	in order efficiently to meet the objectives described in subparagraph (A);	
5.		
6.	(2) with respect to the operation of the Delta cross-channel	
7.	gates described in paragraph (1), collect data on the impact of	
8.	that operation on –	
9.		
10.	(A) species listed as threatened or endangered under the	
11.	Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);	
12.		
13.	(B) water quality; and	
14.		
15.	(C) water supply benefits;	
16.		
17.	(3) collaborate with the California Department of Water Resources to	
18.	install a deflection barrier at Georgiana Slough and the Delta Cross	
19.	Channel Gate to protect migrating salmonids, consistent with knowledge	
20.	gained from activities carried out during 2014 and 2015;	
21.		
22.	(4) <u>upon completion of the pilot project in paragraph (1).</u>	
23.	submit to the Senate Committees	
24.	on Energy and Natural Resources and Environment and Public Works	
25.	and the House Committee on Natural Resources a written notice and	
26.	explanation on the extent to which the gates are able to remain open <u>and</u>	
27.	<u>the pilot project achieves all the goals set forth in</u> paragraphs	
28.	(1) through (3);	
29.		
30.	(5) implement turbidity control strategies that may allow for increased	
31.	water deliveries while avoiding jeopardy to adult Delta smelt (<i>Hypomesus</i>	
32.	<i>transpacificus</i>);	
33.		
34.	(6) in a timely manner, evaluate any proposal to increase flow	
35.	in the San Joaquin River through a voluntary sale, transfer, or exchange	
36.	of water from an agency with rights to divert water from the San Joaquin	
37.	River or its tributaries;	
38.		
39.	(7) adopt a 1:1 inflow to export ratio for the increment of increased flow,	
40.	as measured as a 3-day running average at Vernalis during the period	
41.	from April 1 through May 31, that results from the voluntary sale,	
42.	transfer, or exchange, unless the Secretary of the Interior and Secretary	
43.	of Commerce determine in writing that a 1:1 inflow-to-export ratio for	
		TECHNICAL CHANGE: The Administration requested this non-substantive change.

<p>1. that increment of increased flow will cause additional adverse effects on</p> <p>2. listed salmonid species beyond the range of the effects anticipated to</p> <p>3. occur to the listed salmonid species for the duration of the salmonid</p> <p>4. biological opinion using the best scientific and commercial data available;</p> <p>5. and subject to the condition that any individual sale, transfer, or exchange</p> <p>6. using a 1:1 inflow to export ratio adopted under the authority of this</p> <p>7. section may only proceed if –</p> <p>8.</p> <p>9. (A) the Secretary of the Interior determines that the environmental</p> <p>10. effects of the proposed sale, transfer, or exchange are consistent with</p> <p>11. effects permitted under applicable law (including the Endangered Species</p> <p>12. Act (16 U.S.C. 1531 et seq.), the Federal Water Pollution Control Act (33</p> <p>13. U.S.C. 1381 et seq.), and the Porter-Cologne Water Quality Control Act</p> <p>14. (California Water Code 13000 et seq.);</p> <p>15.</p> <p>16. (B) Delta conditions are suitable to allow movement of the acquired,</p> <p>17. transferred, or exchanged water through the Delta consistent with existing</p> <p>18. Central Valley Project and State Water Project permitted water</p> <p>19. rights and the requirements of section 3405(a)(1)(H) of the Central</p> <p>20. Valley Project Improvement Act; and</p> <p>21.</p> <p>22. (C) such voluntary sale, transfer, or exchange of water results in flow</p> <p>23. that is in addition to flow that otherwise would occur in the absence of</p> <p>24. the voluntary sale, transfer, or exchange;</p> <p>25.</p> <p>26. (8)(A) issue all necessary permit decisions during emergency consultation</p> <p>27. under the authority of the Secretary of the Interior and Secretary of</p> <p>28. Commerce not later than 60 days after receiving a completed application</p> <p>29. by the State to place and use temporary barriers or operable gates in Delta</p> <p>30. channels to improve water quantity and quality for State Water Project</p> <p>31. and Central Valley Project south-of-Delta water contractors and other</p> <p>32. water users, which barriers or gates shall provide benefits for</p> <p>33. species protection and in-Delta water user water quality, provided</p> <p>34. that they are designed so that, if practicable, formal consultations</p> <p>35. under section 7 of the Endangered Species Act of 1973 (16 U.S.C.</p> <p>36. 1536) are not necessary; and</p> <p>37.</p> <p>38. (B) take longer to issue the permit decisions in subparagraph (A) only</p> <p>39. if the Secretary determines in writing that an Environmental Impact</p> <p>40. Statement is needed for the proposal to comply with the National</p> <p>41. Environmental Policy Act of 1969 (42 U.S.C.4321 et seq.);</p> <p>42.</p> <p>43.</p>	<p>The Administration believes 30 days is too short a time period for these reviews</p>
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<p>1. (9) allow and facilitate, consistent with existing priorities, water</p> <p>2. transfers through the C.W. "Bill" Jones Pumping Plant or the Harvey O.</p> <p>3. Banks Pumping Plant from April 1 to November 30;</p> <p>4.</p> <p>5. (10) require the Director of the United States Fish and Wildlife Service</p> <p>6. and the Commissioner of Reclamation to --</p> <p>7.</p> <p>8. (A) determine if a written transfer proposal is complete within 30 days</p> <p>9. after the date of submission of the proposal. If the contracting district or</p> <p>10. agency or the Secretary determines that the proposal is incomplete, the</p> <p>11. district or agency or the Secretary shall state with specificity what must be</p> <p>12. added to or revised for the proposal to be complete;</p> <p>13.</p> <p>14. (B) complete all requirements under the National Environmental Policy</p> <p>15. Act of 1969 (42 U.S.C. 4321 et seq.) and the Endangered Species Act of</p> <p>16. 1973 (16 U.S.C. 1531 et seq.) necessary to make final permit decisions</p> <p>17. on water transfer requests in the State, not later than <u>45</u> days after</p> <p>18. receiving a <u>complete</u> request;</p> <p>19.</p> <p>20. (C) take longer to issue the permit decisions in subparagraph (B) only if</p> <p>21. the Secretary determines in writing that an Environmental Impact</p> <p>22. Statement is needed for the proposal to comply with the National</p> <p>23. Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), or that the</p> <p>24. application is incomplete pursuant to subparagraph (A); and</p> <p>25.</p> <p>26. (D) approve any water transfer request described in subparagraph</p> <p>27. (A) to maximize the quantity of water supplies on the condition that</p> <p>28. actions associated with the water transfer are consistent with</p> <p>29. <u>(1) existing Central Valley Project and State Water Project permitted</u></p> <p>30. <u>water rights and the requirements of section 3405(a)(1)(H) of the</u></p> <p>31. <u>Central Valley Project Improvement Act; and</u></p> <p>32. <u>(2) all other applicable laws and regulations.</u></p> <p>33.</p> <p>34. (11) in coordination with the Secretary of Agriculture, enter into an</p> <p>35. agreement with the National Academy of Sciences to conduct a</p> <p>36. comprehensive study, to be completed not later than 1 year after the date</p> <p>37. of enactment of this Act, on the effectiveness and environmental impacts</p> <p>38. of saltcedar biological control efforts on increasing water supplies and</p> <p>39. improving riparian habitats of the Colorado River and its principal</p> <p>40. tributaries, in the State of California and elsewhere;</p> <p>41.</p> <p>42. (12) pursuant to the research and adaptive management procedures of the</p> <p>43. smelt biological opinion and the salmonid biological opinion use all</p>	<p>TECHNICAL CHANGE: This is already required by the beginning of subsection (b), but the Administration requested the inclusion of this language for clarity.</p>
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1.	available scientific tools to identify any changes to the real-time	
2.	operations of Bureau of Reclamation, State, and local water projects that	
3.	could result in the availability of additional water supplies; and	
4.		
5.	(13) determine whether alternative operational or other management	
6.	measures would meet applicable regulatory requirements for listed	
7.	species while maximizing water supplies and water supply reliability; and	
8.		
9.	(14) continue to vary the averaging period of the Delta Export/Inflow	
10.	ratio, to the extent consistent with any applicable State Water Resources	
11.	Control Board orders under decision D-1641, to operate to a	
12.		
13.	(A) ratio using a 3-day averaging period on the rising limb of a Delta	
14.	inflow hydrograph; and	
15.		
16.	(B) 14-day averaging period on the falling limb of the Delta inflow	
17.	hydrograph.	
18.		
19.	(c) OTHER AGENCIES.-To the extent that a Federal agency other than	
20.	the Department of the Interior and the Department of Commerce has a	
21.	role in approving projects described in subsections (a) and (b), this section	
22.	shall apply to the Federal agency.	
23.		
24.	(d) ACCELERATED PROJECT DECISION AND ELEVATION.	
25.		
26.	(1) IN GENERAL.-On request of the Governor of California, the	
27.	Secretary of the Interior and Secretary of Commerce shall use the	
28.	expedited procedures under this subsection to make final	
29.	decisions relating to Federal or federally-approved projects or	
30.	operational changes proposed pursuant to	
31.	subsections (a) and (b) to provide additional water	
32.	supplies or otherwise address emergency drought conditions.	
33.		
34.	(2) REQUEST FOR RESOLUTION.	
35.	Not later than 7 days after receiving a request of the Governor of	
36.	California, the Secretaries referred to in paragraph (1), or the head of	
37.	another Federal agency responsible for carrying out a review of a project,	
38.	as applicable, the Secretary of the Interior shall convene a final project	
39.	decision meeting with the heads of all relevant Federal agencies to decide	
40.	whether to approve a project to provide emergency water supplies or	
41.	otherwise address emergency drought condition.	
42.		
43.	(3) NOTIFICATION.	

<p>1. Upon receipt of a request for a meeting under this subsection, the</p> <p>2. Secretary of the Interior shall notify the heads of all relevant Federal</p> <p>3. agencies of the request, including a description of the project to be</p> <p>4. reviewed and the date for the meeting.</p> <p>5.</p> <p>6. (4) DECISION.</p> <p>7. Not later than 10 days after the date on which a meeting is requested</p> <p>8. under paragraph (2), the head of the relevant Federal agency shall issue a</p> <p>9. final decision on the project.</p> <p>10.</p> <p>11. (5) MEETING CONVENED BY SECRETARY.</p> <p>12. The Secretary of the Interior may convene a final project decision meeting</p> <p>13. under this subsection at any time, at the discretion of the Secretary,</p> <p>14. regardless of whether a meeting is requested under paragraph (2).</p> <p>15.</p> <p>16. (6) LIMITATION.</p> <p>17.</p> <p>18. The expedited procedures under this subsection apply only to</p> <p>19.</p> <p>20. (A) proposed new Federal projects or operational changes pursuant</p> <p>21. to subsection (a) or (b); and</p> <p>22.</p> <p>23. (B) the extent they are consistent with applicable laws (including</p> <p>24. regulations).</p> <p>25.</p> <p>26. (e) OPERATIONS PLAN.</p> <p>27. The Secretaries of Commerce and the Interior, in consultation with</p> <p>28. appropriate State officials, shall develop an operations plan that is</p> <p>29. consistent with the provisions of this Act and other applicable Federal and</p> <p>30. State laws, including provisions that are intended to provide additional</p> <p>31. water supplies that could be of assistance during the current drought.</p> <p>32.</p> <p>33. SEC. 03. SCIENTIFICALLY SUPPORTED IMPLEMENTATION</p> <p>34. OF OMR FLOW REQUIREMENTS.</p> <p>35.</p> <p>36. (a) IN GENERAL.-In implementing the provisions of the smelt biological</p> <p>37. opinion and the salmonid biological opinion, the Secretary of the</p> <p>38. Interior and the Secretary of Commerce shall manage reverse flow in Old</p> <p>39. and Middle Rivers at the most negative reverse flow rate allowed under</p> <p>40. the applicable biological opinion to maximize water supplies</p> <p>41. for the Central Valley Project and the State Water Project, unless that</p> <p>42. management of reverse flow in Old and Middle Rivers to maximize water</p> <p>43. supplies would cause additional adverse effects on the listed fish species</p>	<p>TECHNICAL CHANGE: Administration requested these changes for clarity here and in subsection (b)(i)(III) below.</p>
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1.	beyond the range of effects anticipated to occur to the listed fish species	
2.	for the duration of the applicable biological opinion, <u>or would be</u>	
3.	<u>inconsistent with applicable state law requirements, including water</u>	
4.	<u>quality, salinity control, and compliance with State Water Resources</u>	
5.	<u>Control Board Order D-1641.</u>	
6.		
7.	(b) REQUIREMENTS.—If the Secretary of the Interior or Secretary of	
8.	Commerce determines to manage rates of pumping at the C.W. “Bill”	
9.	Jones and the Harvey O. Banks pumping plants in the southern Delta to	
10.	achieve a reverse OMR flow rate less negative than the most negative	
11.	reverse flow rate prescribed by the applicable biological opinion, the	
12.	Secretary shall—	
13.		
14.	(i) document in writing any significant facts	
15.	regarding real-time conditions relevant to the	
16.	determinations of OMR reverse flow rates, including—	
17.		
18.	(I) targeted real-time fish monitoring in the	
19.	Old River pursuant to this section, including as it	
20.	pertains to the smelt biological opinion monitoring	
21.	of delta smelt in the vicinity of Station 902; and	
22.		
23.	(II) near-term forecasts with available salvage	
24.	models under prevailing conditions of the effects on	
25.	the listed species of OMR flow at the most negative	
26.	reverse flow rate prescribed by the biological	
27.	opinion;	
28.		
29.	(III) <u>any requirements under applicable state</u>	
30.	<u>law</u> ; and	
31.		
32.	(ii) explain in writing why any decision to manage	
33.	OMR reverse flow at rates less negative than the most	
34.	negative reverse flow rate prescribed by the biological	
35.	opinion is necessary to avoid additional adverse effects	
36.	on the listed fish species beyond the range of effects	
37.	anticipated to occur to the listed fish species for the	
38.	duration of the applicable biological opinion, after	
39.	considering relevant factors such as—	
40.		
41.	(I) the distribution of the listed species	
42.	throughout the Delta;	
43.		

1.	(II) the potential effects of high entrainment	At request of Administration, we made clear nothing in this Act restricts reconsultation and successor biological opinions, language now in savings clause.
2.	risk on subsequent species abundance;	
3.	(III) the water temperature;	
4.	(IV) other significant factors relevant to the	
5.	determination, as required by applicable Federal or	
6.	State laws;	
7.	(V) turbidity; and	
8.	(VI) whether any alternative measures could	
9.	have a substantially lesser water supply impact.	
10.		
11.	(c) LEVEL OF DETAIL REQUIRED. - The analyses and documentation	
12.	required by this section shall be comparable to the depth and complexity	
13.	as is appropriate for real time decision-making. This section shall not be	
14.	interpreted to require a level of administrative findings and documentation	
15.	that could impede the execution of effective real time adaptive	
16.	management.	
17.		
18.	(d) FIRST SEDIMENT FLUSH - During the first flush of sediment out of	
19.	the Delta in each water year, and provided that such determination is	
20.	based upon objective evidence, notwithstanding subsection (a), the	
21.	Secretary of the Interior shall manage OMR flow pursuant to the portion	
22.	of the smelt biological opinion that protects adult Delta smelt from the	
23.	first flush if required to do so by the smelt biological opinion.	
24.		
25.	(e) CONSTRUCTION. - The Secretary of the Interior and the Secretary	
26.	of Commerce are authorized to implement subsection (a) consistent with	
27.	the results of monitoring through Early Warning Surveys to make real	
28.	time operational decisions consistent with the current applicable	
29.	biological opinion.	
30.		
31.	(f) CALCULATION OF REVERSE FLOW IN OMR.— Within 180	
32.	days of the enactment of this title, the Secretary of the Interior is directed,	
33.	in consultation with the California Department of Water Resources, and	
34.	consistent with the smelt biological opinion and the salmonid biological	
35.	opinion, to review, modify, and implement, if appropriate, the method	
36.	used to calculate reverse flow in Old and Middle Rivers, for	
37.	implementation of the reasonable and prudent alternatives in the smelt	
38.	biological opinion and the salmonid biological opinion, and any	
39.	succeeding biological opinions.	
40.		
41.	(g) For any subsequent smelt biological opinion or salmonid biological	
42.	opinion, make the showing required in paragraph (b) for any	
43.	determination to manage OMR reverse flow at rates less negative than the	

1.	most negative limit in the existing applicable biological opinion, to the	
2.	extent that the Secretaries of the Interior and Commerce determine that	
3.	such a required showing is consistent with—	
4.		
5.	(1) section 14(a)(3); and	
6.		
7.	(2) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and the	
8.	regulations implementing that Act.	
9.		
10.		
11.	SEC. 04. TEMPORARY OPERATIONAL FLEXIBILITY FOR	
12.	STORM EVENTS.	
13.		
14.	(a) IN GENERAL. —	
15.		
16.	(1) Nothing in this Act authorizes additional adverse effects on listed	
17.	species beyond the range of the effects anticipated to occur to the	
18.	listed species for the duration of the smelt biological opinion or	
19.	salmonid biological opinion, using the best scientific and commercial	
20.	data available.	
21.		
22.	(2) When consistent with the environmental protection mandate in	
23.	paragraph (1) while maximizing water supplies for Central Valley	
24.	Project and State Water Project contractors, the Secretary of the	
25.	Interior and the Secretary of Commerce, through an operations plan,	
26.	shall evaluate and may authorize the Central Valley Project and the	
27.	State Water Project, combined, to operate at levels that result in	
28.	OMR flows more negative than the most negative reverse flow rate	
29.	prescribed by the applicable biological opinion (based on	
30.	United States Geological Survey gauges on Old and Middle Rivers)	
31.	daily average as described in subsections (b) and (c) to capture peak	
32.	flows during storm-related events.	
33.		
34.	(b) FACTORS TO BE CONSIDERED.-- In determining additional	
35.	adverse effects on any listed fish species beyond the range of effects	
36.	anticipated to occur to the listed fish species for the duration of the smelt	
37.	biological opinion or salmonid biological opinion, using the best scientific	
38.	and commercial data available, the Secretaries of the Interior and	
39.	Commerce may consider factors including:	
40.		
41.	(1) The degree to which the Delta outflow index indicates a	
42.	higher level of flow available for diversion.	
43.		

1.	(2) Relevant physical parameters including projected inflows,	
2.	turbidity, salinities, and tidal cycles.	
3.		
4.	(3) The real-time distribution of listed species.	
5.		
6.	(c) OTHER ENVIRONMENTAL PROTECTIONS.-	
7.		
8.	(1) STATE LAW.-The actions of the Secretary of the Interior and the	
9.	Secretary of Commerce under this section shall be consistent with	
10.	applicable regulatory requirements under State law.	
11.		
12.	(2) FIRST SEDIMENT FLUSH.-During the first flush of sediment out of	
13.	the Delta in each water year, and provided that such determination is	
14.	based upon objective evidence, the Secretary of the Interior shall manage	
15.	OMR flow pursuant to the portion of the smelt biological opinion that	
16.	protects adult Delta smelt from the first flush if required to do so by the	
17.	smelt biological opinion.	
18.		
19.	(3) APPLICABILITY OF OPINION.-This section shall not affect the	
20.	application of the salmonid biological opinion from April 1 to May 31,	
21.	unless the Secretary of Commerce finds that some or all of such	
22.	applicable requirements may be adjusted during this time period to	
23.	provide emergency water supply relief without resulting in additional	
24.	adverse effects on listed salmonid species beyond the range of the effects	
25.	anticipated to occur to the listed salmonid species for the duration of the	
26.	salmonid biological opinion using the best scientific and commercial data	
27.	available. In addition to any other actions to benefit water supply,	
28.	the Secretary of the Interior and the Secretary of Commerce shall consider	
29.	allowing through-Delta water transfer to occur during this period if they	
30.	can be accomplished consistent with section 3405(a)(1)(H) of the Central	
31.	Valley Project Improvement Act and other applicable law.	
32.	Water transfers solely or exclusively through the State Water Project are	
33.	not required to be consistent with section 3405(a)(1)(H) of the Central	
34.	Valley Project Improvement Act.	
35.		
36.	(4) MONITORING.-During operations under this section, the	
37.	Commissioner of Reclamation, in coordination with the Fish and Wildlife	
38.	Service, National Marine Fisheries Service, and California Department of	
39.	Fish and Wildlife, shall undertake expanded monitoring programs	
40.	and other data gathering to improve the efficiency of operations for listed	
41.	species protections and Central Valley Project and State Water Project	
42.	water supply to ensure incidental take levels are not exceeded, and to	
43.	identify potential negative impacts, if any.	

Technical edit
at request of
Administration
to make clear
RPAs submitted
to Reclamation,
who then
submits to
consulting
agencies.

1.		Technical
2.	(d) EFFECT OF HIGH OUTFLOWS.- When exercising their authorities	change in
3.	to capture peak flows pursuant to subsection (c), the Secretary of the	paragraph 6.
4.	Interior and the Secretary of Commerce shall not count such days	
5.	toward the 5-day and 14-day running averages of tidally filtered daily	In para. 6(A),
6.	Old and Middle River flow requirements under the smelt biological	the
7.	opinion and salmonid biological opinion, unless doing so is required to	Administration
8.	avoid additional adverse effects on listed fish species beyond	comments that
9.	those anticipated to occur through implementation of the smelt biological	some
10.	opinion and salmonid biological opinion using the best scientific and	components of
11.	commercial data available.	some RPAs may
12.		not be
13.	(e) LEVEL OF DETAIL REQUIRED FOR ANALYSIS – In	“essential” in
14.	articulating the determinations required under this section,	the strict sense
15.	the Secretary of the Interior and the Secretary of Commerce shall	that jeopardy
16.	fully satisfy the requirements herein but shall not be expected to provide	could be
17.	a greater level of supporting detail for the analysis than feasible	avoided by
18.	to provide within the short timeframe permitted for timely real-time	other measures
19.	decision-making in response to changing conditions in the Delta.	that were not
20.		chosen for good
21.	SEC. _05 CONSULTATION ON COORDINATED OPERATIONS	reasons, e.g.
22.		they were more
23.	(a) In furtherance of the policy established by Section 2(c)(2) of the	expensive, or
24.	Endangered Species Act, that Federal agencies shall cooperate with State	more
25.	and local agencies to resolve water resource issues in concert with	burdensome
26.	conservation of endangered species, in any consultation or reconsultation	
27.	on the coordinated operations of the Central Valley Project and the State	In subsection
28.	Water Project, the Secretaries of the Interior and Commerce shall ensure	(c), the
29.	that any public water agency that contracts for the delivery of water from	Administration
30.	the Central Valley Project or the State Water Project that so requests	wanted some
31.	shall:	definition of the
32.		stakeholders
33.	(1) Have routine and continuing opportunities to discuss and submit	invited to the
34.	information to the action agency for consideration during the	meetings
35.	development of any biological assessment;	
36.	(2) Be informed by the action agency of the schedule for preparation	
37.	of a biological assessment;	
38.	(3) Be informed by the consulting agency, the U.S. Fish and Wildlife	
39.	Service or the National Marine Fisheries Service, of the schedule	
40.	for preparation of the biological opinion at such time as the	
41.	biological assessment is submitted to the consulting agency by the	
42.	action agency;	
43.	(4) Receive a copy of any draft biological opinion and have the	

1.	opportunity to review that document and provide comment to the	
2.	consulting agency through the action agency, which comments	
3.	will be afforded due consideration during the consultation;	
4.	(5) Have the opportunity to confer with the action agency and	
5.	applicant, if any, <u>about reasonable and prudent alternatives prior</u>	
6.	<u>to the action agency or applicant</u> identifying one or more	
7.	reasonable and prudent alternatives for consideration by the	
8.	consulting agency; and	
9.	(6) Where the consulting agency <u>suggests</u> a reasonable and	
10.	prudent alternative be informed:	
11.	(A) how each component of the alternative <u>will contribute to</u>	
12.	<u>avoiding</u> jeopardy or adverse modification of critical	
13.	habitat and the scientific data or information that supports each	
14.	component of the alternative; and	
15.	(B) why other proposed alternative actions that would have	
16.	fewer adverse water supply and economic impacts are inadequate	
17.	to avoid jeopardy or adverse modification of critical habitat.	
18.		
19.	(b) When consultation is ongoing, the Secretaries of the Interior and	
20.	Commerce shall regularly solicit input from and report their progress to	
21.	the Collaborative Adaptive Management Team and the Collaborative	
22.	Science and Adaptive Management Program policy group. The	
23.	Collaborative Adaptive Management Team and the Collaborative Science	
24.	and Adaptive Management Program policy group may provide the	
25.	Secretaries with recommendations to improve the effects analysis and	
26.	federal agency determinations. The Secretaries shall give due	
27.	consideration to the recommendations when developing the Biological	
28.	Assessment and Biological Opinion.	
29.		
30.	(c) The Secretaries shall establish a quarterly stakeholder meeting	
31.	during any consultation or reconsultation for the purpose of providing	
32.	updates on the development of the Biological Assessment and Biological	
33.	Opinion. The quarterly stakeholder meeting shall be open to	
34.	stakeholders <u>identified by the Secretaries representing a broad range of</u>	
35.	<u>interests including environmental, recreational and commercial fishing,</u>	
36.	<u>agricultural, municipal, Delta and other regional interests, and</u> including	
37.	stakeholders that are not state or local agencies.	
38.		
39.	(d) Neither paragraphs (b) or (c) of this section may be used to meet	
40.	the requirements of paragraph (a).	
41.		
42.	(e) For the purposes of paragraph (b) the Collaborative Adaptive	
43.	Management Team, the Collaborative Science and Adaptive Management	

1.	Program policy group, and any recommendations made to the Secretaries	
2.	are exempt from the Federal Advisory Committee Act.	
3.		
4.		
5.	SEC. _06. PROTECTIONS.	
6.		
7.	(a) This section shall apply only to sections 02 through 07 of this Act.	
8.		
9.	(b) OFFSET FOR STATE WATER PROJECT.—	
10.		
11.	(1) IMPLEMENTATION IMPACTS.—The	
12.	Secretary of the Interior shall confer with the	
13.	California Department of Fish and Wildlife in	
14.	connection with the implementation of the	
15.	applicable provisions of this Act on potential	
16.	impacts to any consistency determination for	
17.	operations of the State Water Project issued pursuant	
18.	to California Fish and Game Code section 2080.1.	
19.		
20.	(2) ADDITIONAL YIELD.—If, as a result of the	
21.	application of the applicable provisions of this Act,	
22.	the California Department of Fish and Wildlife—	
23.		
24.	(A) determines that operations of the State	
25.	Water Project are inconsistent with the	
26.	consistency determinations issued pursuant	
27.	to California Fish and Game Code section	
28.	2080.1 for operations of the State Water	
29.	Project; or	
30.	(B) requires take authorization under	
31.	California Fish and Game Code section	
32.	2081 for operation of the State Water	
33.	Project	
34.	in a manner that directly or indirectly results in	
35.	reduced water supply to the State Water Project as	
36.	compared with the water supply available under the	
37.	smelt biological opinion and the salmonid biological	
38.	opinion; and as a result, Central Valley Project yield	
39.	is greater than it otherwise would have been, then that	
40.	additional yield shall be made available to the State	
41.	Water Project for delivery to State Water Project	
42.	contractors to offset that reduced water supply,	
43.		

1.	provided that if it is necessary to reduce water	
2.	supplies for any Central Valley Project authorized	
3.	uses or contractors to make available to the State	
4.	Water Project that additional yield, such reductions	
5.	shall be applied proportionately to those uses or	
6.	contractors that benefit from that increased yield.	
7.		
8.	(3) NOTIFICATION RELATED TO	
9.	ENVIRONMENTAL PROTECTIONS.—The	
10.	Secretary of the Interior and Secretary of Commerce	
11.	shall—	
12.		
13.	(A) notify the Director of the California	
14.	Department of Fish and Wildlife regarding	
15.	any changes in the manner in which the	
16.	smelt biological opinion or the salmonid	
17.	biological opinion is implemented; and	
18.		
19.	(B) confirm that those changes are	
20.	consistent with the Endangered Species Act	
21.	of 1973 (16 U.S.C. 1531 et seq.).	
22.		
23.	(4) Savings.—Nothing in the applicable provisions	
24.	of this Act shall have any effect on the application of	
25.	the California Endangered Species Act (California	
26.	Fish and Game Code sections 2050 through 2116).	
27.		
28.	(c) AREA OF ORIGIN AND WATER RIGHTS PROTECTIONS.—	
29.	(1) IN GENERAL.—The Secretary of the Interior and the	
30.	Secretary of Commerce, in carrying out the mandates of the	
31.	applicable provisions of this Act, shall take no action that—	
32.	(A) diminishes, impairs, or otherwise affects in any	
33.	manner any area of origin, watershed of origin,	
34.	county of origin, or any other water rights	
35.	protection, including rights to water appropriated	
36.	before December 19, 1914, provided under State	
37.	law;	
38.		
39.	(B) limits, expands or otherwise affects the	
40.	application of section 10505, 10505.5, 11128,	
41.	11460, 11461, 11462, 11463 or 12200 through	
42.	12220 of the California Water Code or any other	
43.	provision of State water rights law, without respect	

The
Administration
believes this
language would
violate the
Endangered
Species Act

1.	to whether such a provision is specifically referred	
2.	to in this section; or	
3.		
4.	(C) diminishes, impairs, or otherwise affects in any	
5.	manner any water rights or water rights priorities	
6.	under applicable law.	
7.		
8.		
9.	(2) EFFECT OF ACT.—	
10.	(A) Nothing in the applicable provisions of this Act	
11.	affects or modifies any obligation of the Secretary of	
12.	the Interior under section 8 of the Act of June 17,	
13.	1902 (32 Stat. 390, chapter 1093).	
14.		
15.	(B) Nothing in the applicable provisions of this Act	
16.	diminishes, impairs, or otherwise affects in any	
17.	manner any Project purposes or priorities for the	
18.	allocation, delivery or use of water under applicable	
19.	law, including the Project purposes and priorities	
20.	established under section 3402 and section 3406 of	
21.	the Central Valley Project Improvement Act (Public	
22.	Law 102–575; 106 Stat. 4706).	
23.		
24.	(d) NO REDIRECTED ADVERSE IMPACTS.—	
25.		
26.	(1) IN GENERAL.—The Secretary of the Interior and	
27.	Secretary of Commerce shall not carry out any	
28.	specific action authorized under the applicable	
29.	provisions of this Act that would	
30.	(A) directly or through State agency action indirectly result	
31.	in the involuntary reduction of water supply to an individual,	
32.	district, or agency that has in effect a contract for water with	
33.	the State Water Project or the Central Valley Project,	
34.	including Settlement and Exchange contracts, refuge	
35.	contracts, and Friant Division contracts, as compared to the	
36.	water supply that would be provided in the absence of action	
37.	under this Act, and nothing in this section is intended to	
38.	modify, amend or affect any of the rights and obligations of	
39.	the parties to such contracts; or	
40.		
41.	(B) result in the imposition of actions under section 7 of the	
42.	Endangered Species Act of 1973 (16 U.S.C.1531 et seq.)	
43.		

1.	that would negatively affect water rights or water rights	
2.	priorities established by California law.	
3.	(2) ACTION ON DETERMINATION.—If, after exploring	
4.	all options, the Secretary of the Interior or the Secretary of	
5.	Commerce makes a final determination that a proposed	
6.	action under the applicable provisions of this Act cannot be	
7.	carried out in accordance with paragraph (1), that	
8.	Secretary—	
9.		
10.	(A) shall document that determination in writing for	
11.	that action, including a statement of the facts relied	
12.	on, and an explanation of the basis, for the decision;	
13.	and	
14.		
15.	(B) is subject to applicable law, including the	
16.	Endangered Species Act of 1973 (16 U.S.C. 1531 et	
17.	seq.).	
18.		
19.	(e) ALLOCATIONS FOR SACRAMENTO VALLEY WATER	
20.	SERVICE CONTRACTORS.—	
21.		
22.	(1) DEFINITIONS.—In this subsection:	
23.		
24.	(A) EXISTING CENTRAL VALLEY PROJECT	
25.	AGRICULTURAL WATER SERVICE	
26.	CONTRACTOR WITHIN THE SACRAMENTO	
27.	RIVER WATERSHED.—The term “existing	
28.	Central Valley Project agricultural water service	
29.	contractor within the Sacramento River Watershed”	
30.	means any water service contractor within the	
31.	Shasta, Trinity, or Sacramento River division of the	
32.	Central Valley Project that has in effect a water	
33.	service contract on the date of enactment of this Act	
34.	that provides water for irrigation.	
35.		
36.	(B) YEAR TERMS.—The terms “Above Normal”,	
37.	“Below Normal”, “Dry”, and “Wet”, with respect	
38.	to a year, have the meanings given those terms in the	
39.	Sacramento Valley Water Year Type (40–30–30)	
40.	Index.	
41.		
42.	(2) ALLOCATIONS OF WATER.—	
43.		

1.	(A) ALLOCATIONS.—Subject to subsection (c),	
2.	the Secretary of the Interior shall make every	
3.	reasonable effort in the operation of the Central	
4.	Valley Project to allocate water provided for	
5.	irrigation purposes to each existing Central Valley	
6.	Project agricultural water service contractor within	
7.	the Sacramento River Watershed in accordance with	
8.	the following:	
9.		
10.	(i) Not less than 100 percent of the contract quantity of the existing	
11.	Central Valley Project agricultural water service contractor within	
12.	the Sacramento River Watershed in a “Wet” year.	
13.		
14.	(ii) Not less than 100 percent of the contract quantity of the existing	
15.	Central Valley Project agricultural water service Contractor within	
16.	the Sacramento River Watershed in an “Above Normal” year.	
17.		
18.	(iii) Not less than 100 percent of the contract quantity of the existing	
19.	Central Valley Project agricultural water service contractor within	
20.	the Sacramento River Watershed in a “Below Normal” year that is	
21.	preceded by an “Above Normal” or “Wet” year.	
22.		
23.	(iv) Not less than 50 percent of the contract quantity of the existing	
24.	Central Valley Project agricultural water service contractor within	
25.	the Sacramento River Watershed in a “Dry” year that is preceded	
26.	by a “Below Normal”, “Above Normal”, or “Wet” year.	
27.		
28.	(v) In any other year not identified in any of clauses (i) through (iv),	
29.	not less than twice the allocation percentage to south-of-Delta	
30.	Central Valley Project agricultural water service contractors, up to	
31.	100 percent.	
32.		
33.	(B) EFFECT OF CLAUSE.—In the event of anomalous	
34.	circumstances, nothing in clause (A)(v) precludes an allocation to an	
35.	existing Central Valley Project agricultural water service contractor	
36.	within the Sacramento River Watershed that is greater than twice the	
37.	allocation percentage to a south-of-Delta Central Valley Project	
38.	agricultural water service contractor.	
39.		
40.	(3) PROTECTION OF ENVIRONMENT, MUNICIPAL AND	
41.	INDUSTRIAL SUPPLIES, AND OTHER CONTRACTORS.—	
42.		
43.		

1.	(A) ENVIRONMENT.—Nothing in paragraph (2) shall	
2.	adversely affect any protections for the environment, including—	
3.		
4.	(i) the obligation of the Secretary of the Interior to make	
5.	water available to managed wetlands pursuant to section 3406(d) of	
6.	the Central Valley Project Improvement Act (Public Law 102–575;	
7.	106 Stat. 4722); or	
8.		
9.	(ii) any obligation—	
10.		
11.	(I) of the Secretary of the Interior and the	
12.	Secretary of Commerce under the smelt	
13.	biological opinion, the salmonid biological	
14.	opinion, or any other applicable biological	
15.	opinion; including the Shasta Dam cold	
16.	water pool requirements as set forth in the	
17.	salmonid biological opinion or any other	
18.	applicable State or Federal law (including	
19.	regulations); or	
20.	(II) under the Endangered Species Act of	
21.	1973 (16 U.S.C. 1531 et seq.), the Central	
22.	Valley Project Improvement Act (Public	
23.	Law 102-575; 106 Stat. 4706), or any other	
24.	applicable State or Federal law (including	
25.	regulations).	
26.		
27.	(B) MUNICIPAL AND INDUSTRIAL SUPPLIES.—Nothing in	
28.	paragraph (2) shall —	
29.		
30.	(i) modify any provision of a water Service contract that	
31.	addresses municipal or industrial water shortage policies of	
32.	the Secretary of the Interior and the Secretary of Commerce;	
33.		
34.	(ii) affect or limit the authority of the Secretary of the	
35.	Interior and the Secretary of Commerce to adopt or modify	
36.	municipal and industrial water shortage policies;	
37.		
38.	(iii) affect or limit the authority of the Secretary of the	
39.	Interior and the Secretary of Commerce to implement a	
40.	municipal or industrial water shortage policy;	
41.		
42.	(iv) constrain, govern, or affect, directly or indirectly, the	
43.	operations of the American River division of the Central	

1.	Valley Project or any deliveries from that division or a unit	
2.	or facility of that division; or	
3.		
4.	(v) affects any allocation to a Central Valley Project municipal or	
5.	industrial water service contractor by increasing or decreasing	
6.	allocations to the contractor, as compared to the allocation the	
7.	contractor would have received absent paragraph (2).	
8.		
9.	(C) OTHER CONTRACTORS- Nothing in paragraph (2) shall-	
10.		
11.	(i) affect the priority of any individual or entity with a Sacramento	
12.	River settlement contract over water service or repayment	
13.	contractors;	
14.		
15.	(ii) affect the obligation of the United States to make a substitute	
16.	supply of water available to the San Joaquin River exchange	
17.	contractors;	
18.		
19.	(iii) affect the allocation of water to Friant division contractors of	
20.	the Central Valley Project;	
21.		
22.	(iv) result in the involuntary reduction in contract water	
23.	allocations to individuals or entities with contracts to receive	
24.	water from the Friant division;	
25.		
26.	(v) result in the involuntary reduction in water allocations to	
27.	refuge contractors; or	
28.		
29.	(vi) authorize any actions inconsistent with State water rights law.	
30.		
31.	Sec. __07. NEW MELONES RESERVOIR	
32.		
33.	The Commissioner of Reclamation is directed to work with local water	
34.	and irrigation districts in the Stanislaus River Basin to ascertain the water	
35.	storage made available by the Draft Plan of Operations in New Melones	
36.	Reservoir (DRPO) for water conservation programs, conjunctive use	
37.	projects, water transfers, rescheduled project water and other projects to	
38.	maximize water storage and ensure the beneficial use of the water	
39.	resources in the Stanislaus River Basin. All such programs and projects	
40.	shall be implemented according to all applicable laws and regulations.	
41.	The source of water for any such storage program at New Melones	
42.	Reservoir shall be made available under a valid water right, consistent	
43.	with the State water transfer guidelines and any other applicable State	

1.	water law. The Commissioner shall inform the Congress within 18	
2.	months setting forth the amount of storage made available by the DRPO	
3.	that has been put to use under this program, including proposals received	
4.	by the Commissioner from interested parties for the purpose of this	
5.	section.	
6.		
7.	Sec. 08. STORAGE.	
8.		
9.	(a) DEFINITIONS. — In this subtitle:	
10.		
11.	(1) FEDERALLY OWNED STORAGE PROJECT.—The	
12.	term “federally owned storage project” means any project involving	
13.	a surface water storage facility in a Reclamation State—	
14.		
15.	(A) to which the United States holds title; and	
16.		
17.	(B) that was authorized to be constructed, operated, and	
18.	maintained pursuant to the reclamation laws.	
19.		
20.	(2) STATE-LED STORAGE PROJECT.—The term “State-led	
21.	storage project” means any project in a Reclamation State that—	
22.		
23.	(A) involves a groundwater or surface water storage	
24.	facility constructed, operated, and maintained by any State,	
25.	department of a State, subdivision of a State, or public agency	
26.	organized pursuant to State law; and	
27.		
28.	(B) provides a benefit in meeting any obligation under	
29.	Federal law (including regulations).	
30.		
31.	(b) FEDERALLY OWNED STORAGE PROJECTS.—	
32.		
33.	(1) AGREEMENTS.—On the request of any State, any	
34.	department, agency, or subdivision of a State, or any public agency	
35.	organized pursuant to State law, the Secretary of the Interior may	
36.	negotiate and enter into an agreement on behalf of the United States	
37.	for the design, study, and construction or expansion of any federally	
38.	owned storage project in accordance with this section.	
39.		
40.	(2) FEDERAL COST SHARE.—Subject to the requirements	
41.	of this subsection, the Secretary of the Interior may participate in a	
42.	federally owned storage project in an amount equal to not more than	
43.	50 percent of the total cost of the federally owned storage project.	

1.	(ii) sufficient non-Federal funding is available to	addressing this
2.	complete the State-led storage project; and	
3.		issue through
4.	(iii) the State-led storage project sponsors are	
5.	financially solvent;	WRDA, which it
6.		
7.	(C) the Secretary of the Interior determines that, in return	has.
8.	for the Federal cost-share investment in the State-led storage	
9.	project, at least a proportional share of the project benefits are	
10.	the Federal benefits, including water supplies dedicated to	
11.	specific purposes such as environmental enhancement and	
12.	wildlife refuges; and	
13.		
14.	(D) the Secretary of the Interior submits to Congress a	
15.	written notification of these determinations.	
16.		
17.	(3) ENVIRONMENTAL LAWS.—When participating in a	
18.	State-led storage project under this subsection, the Secretary shall	
19.	comply with all applicable environmental laws, including the	
20.	National Environmental Policy Act of 1969 (42 U.S.C. 4321 et	
21.	seq.).	
22.		
23.	(4) INFORMATION.—When participating in a State-led	
24.	storage project under this subsection, the Secretary of the Interior—	
25.		
26.	(A) may rely on reports prepared by the sponsor of the	
27.	State-led storage project, including feasibility (or equivalent)	
28.	studies, environmental analyses, and other pertinent reports	
29.	and analyses; but	
30.		
31.	(B) shall retain responsibility for making the independent	
32.	determinations described in paragraph (2).	
33.		
34.	(d) AUTHORITY TO PROVIDE ASSISTANCE.—The Secretary of	
35.	the Interior may provide financial assistance under this subtitle to carry	
36.	out projects within any Reclamation State.	
37.		
38.	(e) RIGHTS TO USE CAPACITY.—Subject to compliance with	
39.	State water rights laws, the right to use the capacity of a federally owned	
40.	storage project or State-led storage project for which the Secretary of the	
41.	Interior has entered into an agreement under this subsection shall be	
42.	allocated in such manner as may be mutually agreed to by the Secretary of	
43.	the Interior and each other party to the agreement.	

1.		
2.	(f) COMPLIANCE WITH CALIFORNIA WATER BOND.—	
3.		
4.	(1) IN GENERAL.—The provision of Federal funding for	
5.	construction of a State-led storage project in the State shall be	
6.	subject to the condition that the California Water Commission shall	
7.	determine that the State-led storage project is consistent with the	
8.	California Water Quality, Supply, and Infrastructure Improvement	
9.	Act, approved by California voters on November 4, 2014.	
10.		
11.	(2) APPLICABILITY.—This subsection expires on the date on	
12.	which State bond funds available under the Act referred to in	
13.	paragraph (1) are expended.	
14.		
15.	(g) PARTNERSHIP AND AGREEMENTS.—The Secretary of the	
16.	Interior, acting through the Commissioner, may partner or enter into an	
17.	agreement regarding the water storage projects identified in section	
18.	103(d)(1) of the Water Supply, Reliability, and Environmental	
19.	Improvement Act (Public Law 108–361 ; 118 Stat. 1688) with local joint	
20.	powers authorities formed pursuant to State law by irrigation districts and	
21.	other local water districts and local governments within the applicable	
22.	hydrologic region, to advance those projects.	
23.		
24.	(h) CALFED AUTHORIZATION.—Title I of Public Law 108–361	
25.	(the Calfed Bay-Delta Authorization Act) (118 Stat. 1681; 123 Stat. 2860;	
26.	128 Stat. 164; 128 Stat. 2312) (as amended by section 207 of Public Law	
27.	114–113) is amended by striking “2017” each place it appears and	
28.	inserting “2019”.	
29.		
30.	(i) AUTHORIZATION OF APPROPRIATIONS.—	
31.		
32.	<u>(I) There is authorized to be appropriated to carry out this section</u>	
33.	<u>\$350,000,000 to remain available until expended.</u>	
34.	<u>(II) Projects can only receive funding if enacted appropriations</u>	
35.	<u>legislation designates funding to them by name.</u>	
36.		
37.	(j) SUNSET.—This section shall apply only to federally owned	
38.	storage projects and State-led storage projects that the Secretary of the	
39.	Interior determines to be feasible before January 1, 2021.	
40.		
41.	(k) CONSISTENCY WITH STATE LAW.—Nothing in this section	
42.	preempts or modifies any obligation of the United States to act in	
43.	conformance with applicable State law.	

1.		
2.	Sec. 09.	
3.	(a) REPORT.— Not later than 180 days after the date of enactment of this	
4.	Act, the Secretary of the Army shall submit to the Committees on	
5.	Appropriations and Environment and Public Works of the Senate and the	
6.	Committees on Appropriations and Transportation and Infrastructure of	
7.	the House of Representatives a report describing, with respect to any	
8.	State under a gubernatorial drought declaration during water year 2015,	
9.	the following:	
10.		
11.	(1) A list of Corps of Engineer projects and non-Federal projects operated	
12.	for flood control in accordance with rules prescribed by the Secretary of	
13.	the Army pursuant to section 7 of the Act of December 22, 1944	
14.	(commonly known as the “Flood Control Act of 1944” (58 Stat. 890,	
15.	chapter 665)).	
16.		
17.	(2) The year during which the original water control manual was	
18.	approved.	
19.		
20.	(3) The year during which any subsequent revisions to the water control	
21.	plan and manual of the project are proposed to occur.	
22.		
23.	(4) A list of projects for which operational deviations for drought	
24.	contingency have been requested, and the status of the request.	
25.		
26.	(5) The means by which water conservation and water quality	
27.	improvements were addressed.	
28.		
29.	(6) A list of projects for which permanent or seasonal changes to storage	
30.	allocations have been requested, and the status of the request.	
31.		
32.	(b) PROJECT IDENTIFICATION.— Not later than 60 days after the date of	
33.	completion of the report under subsection (a), the Secretary of the Army	
34.	shall identify any projects described in the report that meet the following	
35.	criteria:	
36.		
37.	(1) The project is located in a State in which a drought emergency has	
38.	been declared or was in effect during the 1-year period preceding the	
39.	date of final review by the Secretary.	
40.		
41.		
42.		
43.		

1.	LOSSES CAUSED BY THE CONSTRUCTION AND OPERATION	
2.	LOSSES CAUSED BY THE CONSTRUCTION AND OPERATION	
3.	LOSSES CAUSED BY THE CONSTRUCTION AND OPERATION	
4.		
5.	(3) A non-Federal sponsor of a Corps of Engineers project, or owner of a	
6.	non-Federal project, as applicable, has submitted to the Secretary a	
7.	written request to revise water operations manuals, including flood	
8.	control rule curves, based on the use of improved weather forecasting or	
9.	run-off forecasting methods, new watershed data, changes to project	
10.	operations, or structural improvements.	
11.		
12.	(c) PILOT PROJECTS.—	
13.		
14.		
15.	(1) IN GENERAL.— Not later than 1 year after the date of identification of	
16.	projects under subsection (b), if any, the Secretary of the Army shall	
17.	carry out not more than 15 pilot projects, including not less than 6 non-	
18.	Federal projects (within the meaning of subsection (a)(1)), if any are	
19.	identified under subsection (b), to implement revisions of water	
20.	operations manuals, including flood control rule curves, based on the	
21.	best available science, which may include—	
22.		
23.	(A) forecast-informed operations;	
24.		
25.	(B) new watershed data; and	
26.		
27.	(C) if applicable, in the case of non-Federal projects, structural	
28.	improvements.	
29.		
30.		
31.	(2) CONSULTATION.— In implementing the pilot projects pursuant to this	
32.	subsection, the Secretary of the Army shall consult with all affected	
33.	interests, including—	
34.		
35.	(A) non-Federal entities responsible for operations and maintenance	
36.	costs of a Corps of Engineers facility;	
37.		
38.	(B) affected water rights holders;	
39.		
40.	(C) individuals and entities with storage entitlements; and	
41.		
42.		
43.		

1.	LOSSES CAUSED BY THE CONSTRUCTION AND OPERATION	
2.	LOSSES CAUSED BY THE CONSTRUCTION AND OPERATION	
3.		
4.	(d) COORDINATION WITH NON-FEDERAL PROJECT ENTITIES.— Before	
5.	carrying out an activity under this section, if a project identified under	
6.	subsection (b) is—	
7.		
8.	(1) a non-Federal project, the Secretary of the Army shall—	
9.		
10.	(A) consult with the non-Federal project owner; and	
11.		
12.	(B) enter into a cooperative agreement, memorandum of understanding,	
13.	or other agreement with the non-Federal project owner describing the	
14.	scope and goals of the activity and the coordination among the parties;	
15.	or	
16.		
17.		
18.	(2) owned and operated by the Corps of Engineers, the Secretary of the	
19.	Army shall—	
20.		
21.	(A) consult with each non-Federal entity (including a municipal water	
22.	district, irrigation district, joint powers authority, or other local	
23.	governmental entity) that currently—	
24.		
25.	(i) manages (in whole or in part) a Corps of Engineers dam or reservoir;	
26.	or	
27.		
28.	(ii) is responsible for operations and maintenance costs; and	
29.		
30.	(B) enter into a cooperative agreement, memorandum of understanding,	
31.	or other agreement with each the entity describing the scope and goals	
32.	of the activity and the coordination among the parties.	
33.		
34.		
35.	(e) CONSIDERATION.— In designing and implementing a forecast-	
36.	informed reservoir operations plan, the Secretary of the Army shall work	
37.	closely with the National Oceanic and Atmospheric Administration and	
38.	may consider —	
39.		
40.	(1) the relationship between ocean and atmospheric conditions,	
41.	including the El Niño and La Niña cycles, and the potential for above-	
42.		
43.		
		The Administration raised concerns about the language in section 10. This is language that we understand was acceptable to Interior in December 2015.

1.	normal, normal, and below normal rainfall for the coming water year,	
2.	including consideration of atmospheric river forecasts;	
3.		
4.	(2) the precipitation and runoff index specific to the basin and watershed	
5.	of the relevant dam or reservoir, including incorporating knowledge of	
6.	hydrological and meteorological conditions that influence the timing and	
7.	quantity of runoff;	
8.		
9.	(3) improved hydrologic forecasting for precipitation, snowpack, and soil	
10.	moisture conditions;	
11.		
12.	(4) an adjustment of operational flood control rule curves to optimize	
13.	water supply storage and reliability, hydropower production,	
14.	environmental benefits for flows and temperature, and other authorized	
15.	project benefits, without a reduction in flood safety; and	
16.		
17.		
18.	(5) proactive management in response to changes in forecasts.	
19.		
20.	(f) FUNDING.—	
21.		
22.	(1) DEFINITION OF OPERATIONAL DOCUMENT.—In this subsection, the	
23.	term “operational document” means—	
24.		
25.	(A) a water control plan;	
26.		
27.	(B) a water control manual;	
28.		
29.	(C) a water control diagram;	
30.		
31.	(D) a release schedule;	
32.		
33.	(E) a rule curve;	
34.		
35.	(F) an operational agreement with a non-Federal entity; and	
36.		
37.	(G) any environmental documentation associated with a document	
38.	described in any of subparagraphs (A) through (F).	
39.		
40.		
41.	(2) ACCEPTANCE AND USE.—The Secretary of the Army may accept and	
42.	expend amounts from non-Federal entities to fund all or a portion of the	
43.		House Rs indicated that the Water Desalination Act would be reauthorized through WRDA, so we could use the authorization amount for other desalination projects, which we do here. We authorize funding for this program at \$50 million, \$25 million from what would have been provided for the

1. cost of carrying out a review or revision of operational documents for	Desalination,
2. any reservoir that is either operated or maintained by the Secretary, or	and an extra
3. for which the Secretary is authorized to prescribe regulations or	\$25 million from
4. otherwise advise or consult concerning the use of storage allocated for	some of the
5. flood risk management or navigation.	authorization
6.	available by
7. (g) EFFECT OF MANUAL REVISIONS AND OTHER PROVISIONS.—	eliminating
8.	RIFIA.
9. (1) MANUAL REVISIONS.—In accordance with all applicable laws, a	At the request
10. revision of a manual shall not interfere with—	of House
11.	Republicans,
12. (A) the authorized purposes of a Corps of Engineers project; or	language
13.	included to
14. (B) the existing purposes of a non-Federal project that is regulated for	require a cost
15. flood control by the Secretary of the Army.	benefit analysis
16.	both in desal
17.	section and Title
18. (2) EFFECT.—	XVI section.
19.	
20. (A) ACT.—Nothing in this Act authorizes the Secretary of the Army to	
21. carry out, at a Corps of Engineers or non-Federal dam or reservoir, any	
22. project or activity for a purpose not otherwise authorized as of the date	
23. of enactment of this Act.	
24.	
25. (B) SECTION.—Nothing in this section—	
26.	
27. (i) affects or modifies any obligation of the Secretary of the Army under	
28. State law; or	
29.	
30. (ii) authorizes the diversion or use of water in a manner that is	
31. inconsistent with State water rights law.	
32.	
33.	
34. (3) BUREAU OF RECLAMATION PROJECTS EXCLUDED.—This section shall	
35. not apply to any dam or reservoir owned by the Bureau of Reclamation.	
36.	
37. (h) MODIFICATIONS TO MANUALS AND CURVES.—Not later than 180 days	Per House
38. after the date of completion of a modification to an operations manual	Republican ask
39. or flood control rule curve, the Secretary of the Army shall submit to	to eliminate
40. Congress a report regarding the components of the forecast-based	RIFIA, added
41. reservoir operations plan incorporated into the change.	\$25 million to
42.	
43.	

1.	LOSSES CAUSED BY THE CONSTRUCTION AND	the Title XVI authorization.
2.	OPERATION OF STORAGE PROJECTS.	
3.		
4.	<u>(a) MARINAS, RECREATIONAL FACILITIES, OTHER</u>	Deleted at request of House Republicans who oppose RIFIA.
5.	<u>BUSINESSES.— If in constructing any new or modified water</u>	
6.	<u>storage project included in section 103(d)(1)(A) of Public Law</u>	
7.	<u>108-361 (118 Stat. 1684), the Bureau of Reclamation destroys or</u>	
8.	<u>otherwise adversely affects any existing marina, recreational</u>	
9.	<u>facility, or other water-dependent business when constructing or</u>	
10.	<u>operating a new or modified water storage project, the Secretaries</u>	
11.	<u>of the Interior and Agriculture, acting through the Bureau and the</u>	
12.	<u>Forest Service shall—</u>	
13.		
14.	<u>(1) provide compensation otherwise required by law; and</u>	
15.		
16.	<u>(2) provide the owner of the affected marina, recreational facility,</u>	
17.	<u>or other water-dependent business under mutually agreeable</u>	
18.	<u>terms and conditions with the right of first refusal to construct and</u>	
19.	<u>operate a replacement marina, recreational facility, or other</u>	
20.	<u>water-dependent business, as the case may be, on United States</u>	
21.	<u>land associated with the new or modified water storage project.</u>	
22.	<u>(b) HYDROELECTRIC PROJECTS.—If in constructing any new or</u>	
23.	<u>modified water storage project included in section 103(d)(1)(A)</u>	
24.	<u>of Public Law 108-361 (118 Stat. 1684), the Bureau of</u>	
25.	<u>Reclamation reduces or eliminates the capacity or generation of</u>	
26.	<u>any existing non-Federal hydroelectric project by inundation or</u>	
27.	<u>otherwise, the Secretary of the Interior shall—</u>	
28.	<u>(1) provide compensation otherwise required by law;</u>	
29.		
30.	<u>(2) provide the owner of the affected hydroelectric project under</u>	
31.	<u>mutually agreeable terms and conditions with a right of first</u>	
32.	<u>refusal to construct, operate, and maintain replacement</u>	
33.	<u>hydroelectric generating facilities at such new or modified water</u>	
34.	<u>storage project, on federal land associated with the new or</u>	
35.	<u>modified water storage project or on private land owned by the</u>	
36.	<u>affected hydroelectric project owner;</u>	
37.	<u>(3) provide compensation for the construction of any water</u>	
38.	<u>conveyance facilities as are necessary to convey water to any new</u>	
39.	<u>powerhouse constructed by such owner in association with such</u>	
40.	<u>new hydroelectric generating facilities; and</u>	
41.	<u>(4) provide for subsections (b)(1), (2), and (3) at a cost not to</u>	
42.	<u>exceed the estimated value of the actual impacts to any existing</u>	
43.	<u>non-Federal hydroelectric project and as estimated for the</u>	

1.	<u>associated feasibility study, including additional planning,</u>	
2.	<u>environmental, design, construction, and operations and</u>	
3.	<u>maintenance costs for existing and replacement facilities.</u>	
4.		
5.	(c) <u>COST ALLOCATION. —Any compensation under this section</u>	
6.	<u>shall be a project cost and allocated to project beneficiaries.</u>	
7.		
8.	(d) <u>APPLICABILITY. —This section shall only apply to federally</u>	
9.	<u>owned water storage projects, whether authorized under section 8</u>	
10.	<u>of this bill or some other authority.</u>	
11.		
12.	(e) <u>LIMITATION.—Nothing in this Section affects the ability of</u>	
13.	<u>landowners or tribes to seek compensation or any other remedy</u>	
14.	<u>otherwise required by law.</u>	
15.	Sec. 10. OTHER WATER SUPPLY PROJECTS.	
16.	<u>Section 4 of the Water Desalination Act of 1996 (42 U.S.C. 10301 note;</u>	
17.	(a) <u>Section 8 of the Water Desalination Act of 1996 (42 U.S.C.</u>	
18.	<u>10301 note; Public Law 104-298) is amended in subsection (a) in</u>	
19.	<u>the first sentence, by striking “2013” and inserting “2021”.</u>	
20.	<u>Section 4 of the Water Desalination Act of 1996 (42 U.S.C.</u>	
21.	<u>10301 note; Public Law 104-298) is amended—</u>	
22.		
23.	<u>(1) in subsection (a)—</u>	
24.	<u>(A) by redesignating paragraphs (2) and (3) as paragraphs (3) and</u>	
25.	<u>(4), respectively; and</u>	
26.		
27.	<u>(B) by inserting after paragraph (1) the following:</u>	
28.		
29.	<u>“(1) PROJECTS.—</u>	
30.		
31.	<u>(A) IN GENERAL. A non-Federal interest may submit to</u>	
32.	<u>the Secretary of the Interior proposals for eligible</u>	
33.	<u>projects in the form of completed feasibility studies.</u>	
34.		
35.	<u>(B) AUTHORITY TO PROVIDE ASSISTANCE. The Secretary</u>	
36.	<u>of the Interior shall administer a competitive grant</u>	
37.	<u>program under which the non-Federal project sponsor</u>	
38.	<u>of any project determined by the Secretary to be</u>	
39.	<u>feasible, including economic feasibility, shall be</u>	
40.	<u>eligible to apply for funding for the planning, design,</u>	
41.	<u>and construction of the project.</u>	
42.		
43.	<u>(C) ELIGIBLE PROJECTS. A desalination project shall</u>	
	<u>be considered eligible for consideration under this</u>	

1.	<u>subsection if the project is within any Reclamation</u>	
2.	<u>State, Alaska, or Hawaii.</u>	
3.		
4.	<u>(D) AUTHORIZATION OF APPROPRIATIONS.—There is</u>	
5.	<u>authorized to be appropriated to the Secretary of the</u>	
6.	<u>Interior to carry out this subsection \$50,000,000, to</u>	
7.	<u>remain available through fiscal year 2021.</u>	
8.	(b) Section 1602 of the Reclamation Wastewater and Groundwater	
9.	Study and Facilities Act (43 U.S.C. 390h) is amended by adding	
10.	at the end the following:	
11.		
12.	“(c) Authorization of new water recycling and reuse projects.—	
13.		
14.	(1) IN GENERAL. A non-Federal interest may submit to	
15.	the Secretary of the Interior proposals for eligible projects	
16.	in the form of completed feasibility studies.	
17.		
18.	(2) AUTHORITY TO PROVIDE ASSISTANCE. The Secretary	
19.	of the Interior shall administer a competitive grant	
20.	program under which the non-Federal project sponsor of	
21.	any project determined by the Secretary to be feasible,	
22.	<u>including economic feasibility,</u> shall be eligible to apply	
23.	for funding for the planning, design, and construction of	
24.	the project.	
25.		
26.	(3) ELIGIBLE PROJECTS. A project shall be considered	
27.	eligible for consideration under this subsection if the	
28.	project is within any Reclamation State, Alaska, or	
29.	Hawaii, and it reclaims and reuses—	
30.		
31.	(A) municipal, industrial, domestic or agricultural	
32.	wastewater; or	
33.		
34.	(B) impaired groundwater or surface water.	
35.		
36.	(c) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to	
37.	be appropriated to the Secretary of the Interior to carry out this	
38.	subsection \$ <u>75</u> ,000,000, to remain available until expended.	
39.		
40.		
41.	(d) Section 9504 of the Omnibus Public Land Management Act of	
42.	2009 (42 U.S.C. 10364) is amended in subsection (c) by striking	
43.	“\$350,000,000” and inserting “\$450,000,000” on the condition	

1.	that of that amount, \$50,000,000 of it is used to carry out section	
2.	206 of the Energy and Water Development and Related Agencies	
3.	Appropriation Act, 2015 (43 U.S.C. 620 note; Public Law 113-	
4.	235)..	
5.		
6.	(e)–	
7.		
8.		
9.	(1) in paragraph (6), by striking “Secretary or the Administrator”	
10.	and inserting “Secretary, the Administrator, or the Secretary of	
11.	the Interior”;	
12.		
13.	(2) in paragraph (10), by striking “Secretary or Administrator”	
14.	and inserting “Secretary, the Administrator, or the Secretary of	
15.	the Interior”;	
16.	(3) by redesignating paragraphs (10) through (15) as paragraphs	
17.	(11) through (16), respectively; and	
18.		
19.	(4) by inserting after paragraph (9) the following:	
20.		
21.	“(10) RECLAMATION STATE. — The term ‘Reclamation State’	
22.	means any of the States of —	
23.		
24.	“(A) Arizona;	
25.	“(B) California;	
26.	“	
27.	Sec. 11. ACTIONS TO BENEFIT THREATENED	
28.	Sec. 11. ACTIONS TO BENEFIT THREATENED AND	
29.	Sec. 11. ACTIONS TO BENEFIT THREATENED AND	
30.		
31.	“(i) is selected under section 5028; or	
32.		
33.	“(ii) otherwise meets the requirements of section	
34.	5028.”;	
35.		
36.	(iv) by redesignating paragraphs (2) and (3) as paragraphs	
37.	(3) and (4), respectively; and	
38.		
39.	(v) by inserting after paragraph (1) the following:	
40.		
41.	“(2) LIMITATION ON REFINANCING OF INTERIM CONSTRUCTION	
42.	FINANCING. — A secured loan under paragraph (1) shall not be used	
43.	to refinance interim construction financing under paragraph (1)(B)	

1.	after the date that is 1 year after the date of substantial completion of	
2.	the applicable project.”.	
3.		
4.	(H) Program Administration.—Section 5030 of the Water	
5.	Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. 3909) is	
6.	amended—	
7.		
8.	(i) by striking “Secretary or the Administrator” each place it	
9.	appears and inserting “Secretary, the Administrator, or the Secretary	
10.	of the Interior”; and	
11.		
12.	(ii) by adding at the end the following:	
13.		
14.	“(f) Interagency Cooperation.—The Secretary, the Administrator, or	
15.	the Secretary of the Interior, as applicable, may enter into a memorandum	
16.	of agreement with the Secretary of the Treasury, the Secretary of	
17.	Agriculture, or any other Federal agency that the Secretary, the	
18.	Administrator, or the Secretary of the Interior determines to be	
19.	appropriate to provide program administration assistance that would	
20.	reduce the cost of and improve the efficiency of the program under this	
21.	subtitle.”.	
22.		
23.	(I) Regulations.—Section 5032 of the Water Infrastructure Finance and	
24.	Innovation Act of 2014 (33 U.S.C. 3911) is amended—	
25.		
26.	(i) by striking “Secretary or the Administrator” and inserting	
27.	“Secretary, the Administrator, or the Secretary of the Interior”; and	
28.		
29.	(ii) by striking “Secretary or Administrator” and inserting	
30.	“Secretary, the Administrator, or the Secretary of the Interior”.	
31.		
32.	(J) Limitation.—Neither the Secretary of the Interior nor the Secretary	
33.	of Commerce shall enter into a contract with, or provide Federal funds or	
34.	other financial assistance in the form of a loan, loan guarantee, annual	
35.	payment, or any other form of credit enhancement to a recipient under this	
36.	Act without first obtaining adequate assurance from the contractor or	
37.	recipient that the requirements of section 513 of the Federal Water	
38.	Pollution Control Act (33 U.S.C. 1372) shall be applied in the same	
39.	manner they are applied to construction of treatment works carried out in	
40.	whole or in part with assistance made available by a State water pollution	
41.	control revolving fund as authorized by title VI of that Act (33 U.S.C.	
42.	1381 et seq.) under title II of division E of Public Law 112–74 (125 Stat.	
43.	1020).	We added \$4 million to subsection (A)

1.		
2.	(K) Funding.—Section 5033 of the Water Infrastructure Finance and	
3.	Innovation Act of 2014 (33 U.S.C. 3912) is amended—	
4.		
5.	(i) in subsection (a) —	
6.		
7.	(I) by redesignating paragraphs (1) through (5) as	
8.	subparagraphs (A) thro, respectively, and indenting	
9.	appropriately;	
10.		
11.	(II) in the matter preceding subparagraph (A) (as	
12.	redesignated by subparagraph (A)), by striking “There is	
13.	authorized” and inserting the following:	
14.		
15.	“(1) CORPS OF ENGINEERS AND EPA.—There is authorized”; and	
16.	(C) by adding at the end the following:	
17.		
18.	“(2) BUREAU OF RECLAMATION.—There is authorized to be	
19.	appropriated to the Secretary of the Interior to carry out this subtitle,	
20.	to remain available until expended, \$50,000,000, of which not less	
21.	than \$25,000,000 shall be available solely to support the	
22.	development of new water storage projects.”;	
23.		
24.	(ii) by striking subsection (b) and inserting the following:	
25.		
26.	“(b) Administrative Costs.—Of the funds made available to carry out	
27.	this subtitle, the Secretary, the Administrator, or the Secretary of the	
28.	Interior, as applicable, may use for the administration of this subtitle,	
29.	including for the provision of technical assistance to aid project sponsors	
30.	in obtaining the necessary approvals for the project —	
31.		
32.	“(1) in the case of the Secretary or the Administrator, not more	
33.	than \$2,200,000 for each of fiscal years 2015 through 2019; and	
34.		
35.	“(2) in the case of the Secretary of the Interior, not more than	
36.	\$2,200,000 for each fiscal year during which funds are available.”;	
37.	and	
38.		
39.	(L) (3) in subsection (d), by striking “Secretary or the Administrator”	
40.	and inserting “Secretary, the Administrator, or the Secretary of the	
41.	Interior”.	
42.		
43.		
		that came from the deletion of the trap and barge program (at request of Administration) with its \$4 million authorization

1.	Sec. 11. ACTIONS TO BENEFIT THREATENED AND	
2.	ENDANGERED SPECIES AND OTHER WILDLIFE.	
3.		
4.	(a) Increased real-time monitoring and updated science.	
5.		
6.	(1) SMELT BIOLOGICAL OPINION.—The Director shall use the	
7.	best scientific and commercial data available to implement,	
8.	continuously evaluate, and refine or amend, as appropriate, the	
9.	reasonable and prudent alternative described in the smelt	
10.	biological opinion.	
11.	(2) INCREASED MONITORING TO INFORM REAL-TIME	
12.	OPERATIONS.—	
13.		
14.	(A) IN GENERAL.—The Secretary of the Interior shall conduct	
15.	additional surveys, on an annual basis at the appropriate	
16.	time of year based on environmental conditions, in	
17.	collaboration with interested stakeholders regarding the	
18.	science of the Delta in general, and to enhance real time	
19.	decisionmaking in particular, working in close coordination	
20.	with relevant State authorities.	
21.	(B) REQUIREMENTS.—In carrying out this subsection, the	
22.	Secretary of the Interior shall use—	
23.	(i) the most appropriate and accurate survey methods	
24.	available for the detection of Delta smelt to	
25.	determine the extent to which adult Delta smelt are	
26.	distributed in relation to certain levels of turbidity or	
27.	other environmental factors that may influence	
28.	salvage rate;	
29.	(ii) results from appropriate surveys for the detection of	
30.	Delta smelt to determine how the Central Valley	
31.	Project and State Water Project may be operated	
32.	more efficiently to maximize fish and water supply	
33.	benefits; and	
34.	(iii) science-based recommendations developed by any	
35.	of the persons or entities described in subsection	
36.	(d)(2) to inform the agencies’ real-time decisions.	
37.	(C) WINTER MONITORING.—During the period between	
38.	December 1 and March 31, if suspended sediment loads	
39.	enter the Delta from the Sacramento River, and the	
40.	suspended sediment loads appear likely to raise turbidity	
41.	levels in the Old River north of the export pumps from	
42.	values below 12 Nephelometric Turbidity Units (NTUs) to	
43.	values above 12 NTUs, the Secretary of the Interior shall—	
		Deleted because Admin thinks program is problematic.

1.	(i)	conduct daily monitoring using appropriate survey	
2.		methods at locations including the vicinity of	
3.		Station 902 to determine the extent to which adult	
4.		Delta smelt are moving with turbidity toward the	
5.		export pumps; and	
6.	(ii)	use results from the monitoring under subparagraph	
7.		(A) to determine how increased trawling can inform	
8.		daily real-time Central Valley Project and State	
9.		Water Project operations to maximize fish and	
10.		water supply benefits.	
11.			
12.	(3)	PERIODIC REVIEW OF MONITORING.—Not later than 1 year	
13.		after the date of enactment of this Act, the Secretary of the	
14.		Interior shall—	
15.	(A)	evaluate whether the monitoring program under subsection	
16.		(b), combined with other monitoring programs for the Delta,	
17.		is providing sufficient data to inform Central Valley Project	
18.		and State Water Project operations to maximize the water	
19.		supply for fish and water supply benefits; and	
20.			
21.	(B)	determine whether the monitoring efforts should be changed	
22.		in the short or long term to provide more useful data.	
23.			
24.	(4)	DELTA SMELT DISTRIBUTION STUDY.—	
25.	(A)	IN GENERAL.—Not later than March 15, 2021, the	
26.		Secretary of the Interior shall—	
27.	(i)	complete studies, to be initiated by not later than 90	
28.		days after the date of enactment of this Act,	
29.		designed—	
30.			
31.		(AA) to understand the location and determine the	
32.		abundance and distribution of Delta smelt throughout the	
33.		range of the Delta smelt; and	
34.			
35.		(BB) to determine potential methods to minimize	
36.		the effects of Central Valley Project and State Water	
37.		Project operations on the Delta smelt;	
38.			
39.	(ii)	based on the best available science, if appropriate	
40.		and practicable, implement new targeted sampling	
41.		and monitoring of Delta smelt in order to maximize	
42.		fish and water supply benefits prior to completion of	
43.		the study under subparagraph (A);	

1.		
2.	(iii)	to the maximum extent practicable, use new
3.		technologies to allow for better tracking of Delta
4.		smelt, such as acoustic tagging, optical recognition
5.		during trawls, and fish detection using residual
6.		deoxyribonucleic acid (DNA); and
7.		
8.	(iv)	if new sampling and monitoring is not implemented
9.		under subparagraph (B), provide a detailed
10.		explanation of the determination of the Secretary of
11.		the Interior that no change is warranted.
12.		
13.	(B)	CONSULTATION.—In determining the scope of the
14.		studies under this subsection, the Secretary of the Interior
15.		shall consult with—
16.	(i)	Central Valley Project and State Water Project
17.		water contractors and public water agencies;
18.	(ii)	other public water agencies;
19.	(iii)	the California Department of Fish and Wildlife and
20.		the California Department of Water Resources; and
21.	(iv)	nongovernmental organizations.
22.	(b)	Actions to benefit endangered fish populations.
23.	(1)	FINDINGS.—Congress finds that—
24.		
25.	(A)	minimizing or eliminating stressors to fish populations and their
26.		habitat in an efficient and structured manner is a key aspect of a
27.		fish recovery strategy;
28.	(B)	functioning, diverse, and interconnected habitats are necessary for
29.		a species to be viable; and
30.	(C)	providing for increased fish habitat may not only allow for a more
31.		robust fish recovery, but also reduce impacts to water supplies.
32.	(2)	ACTIONS FOR BENEFIT OF ENDANGERED SPECIES.—There
33.		is authorized to be appropriated the following amounts:
34.		
35.	(A)	\$24,000,000 for the Secretary of Commerce, through the
36.		Administrator of the National Oceanic and Atmospheric
37.		Administration, to carry out the following activities in
38.		accordance with the Endangered Species Act of 1973 (16
39.		U.S.C. 1531 et seq.):
40.		
41.	(B)	Gravel and rearing area additions and habitat restoration to
42.		the Sacramento River to benefit Chinook salmon and
43.		steelhead trout.

1.		
2.		
3.	(ii) Scientifically improved and increased real-time	
4.	monitoring to inform real-time operations of Shasta and related	
5.	Central Valley Project facilities, and alternative methods,	
6.	models, and equipment to improve temperature modeling and	
7.	related forecasted information for purposes of predicting	
8.	impacts to salmon and salmon habitat as a result of water	
9.	management at Shasta.	
10.		
11.	(iii) Methods to improve the Delta salvage systems,	
12.	including alternative methods to redeposit salvaged salmon	
13.	smolts and other fish from the Delta in a manner that reduces	
14.	predation losses.	
15.		
16.	(C) \$3,000,000 for the Secretary of the Interior to conduct the	
17.	Delta smelt distribution study referenced in section 301.	
18.		
19.	(3) COMMENCEMENT.—If the Administrator of the National	
20.	Oceanic and Atmospheric Administration determines that a	
21.	proposed activity is feasible and beneficial for protecting and	
22.	recovering a fish population, the Administrator shall commence	
23.	implementation of the activity by not later than 1 year after the	
24.	date of enactment of this Act.	
25.		
26.	(4) CONSULTATION.—The Administrator shall take such steps as	
27.	are necessary to partner with, and coordinate the efforts of, the	
28.	Department of the Interior, the Department of Commerce, and	
29.	other relevant Federal departments and agencies to ensure that all	
30.	Federal reviews, analyses, opinions, statements, permits,	
31.	licenses, and other approvals or decisions required under Federal	
32.	law are completed on an expeditious basis, consistent with	
33.	Federal law.	
34.		
35.	(5)	
36.	(A) IN GENERAL.—The Department of Commerce, in	
37.	collaboration with the Department of the Interior, the California	
38.	Department of Fish and Wildlife, applicable water agencies, and other	
39.	interested parties, shall design, permit, implement, and evaluate a pilot	
40.	program to test the efficacy of an experimental trap and barge program to	
41.	improve survival of juvenile salmonids emigrating from the San Joaquin	
42.	watershed through the Delta.	
43.		

1.	CONSERVATION FISH HATCHERIES.—	
2.		
3.	(i) WORKING GROUP.— Not later than 30 days after the date of	
4.	enactment of this Act, the Assistant Administrator and the Commissioner	
5.	shall convene a working group, to be comprised of representatives of	
6.	relevant agencies and other interested parties, to develop and execute a	
7.	plan for the design, budgeting, implementation, and evaluation of the pilot	
8.	program under this subsection, using such existing expertise regarding	
9.	trap and barge programs as may be available.	
10.		
11.	(ii) REQUIREMENTS.— The plan under this paragraph shall —	
12.		
13.	(A.A) include a schedule and budget for the pilot program; and	
14.		
15.	(BB) identify the responsible parties for each element of the	
16.	program.	
17.		
18.	(C) IMPLEMENTATION.— The Assistant Administrator and the	
19.	Commissioner shall seek to commence implementation of the pilot	
20.	program under this subsection during calendar year 2016, if practicable.	
21.		
22.	(D) AUTHORIZATION OF APPROPRIATIONS.— There is	
23.	authorized to be appropriated to carry out this subsection \$4,000,000.	
24.		
25.	(6) CONSERVATION FISH HATCHERIES.—	
26.		
27.	(A) IN GENERAL.—Not later than 2 years after the date of	
28.	enactment of this Act, the Secretaries of the Interior and	
29.	Commerce, in coordination with the Director of the	
30.	California Department of Fish and Wildlife, shall develop	
31.	and implement as necessary the expanded use of	
32.	conservation hatchery programs to enhance, supplement, and	
33.	rebuild Delta smelt and Endangered Species Act-listed fish	
34.	species under the smelt and salmonid biological opinions.	
35.	(B) REQUIREMENTS.—The conservation hatchery programs	
36.	established under paragraph (1) and the associated hatchery	
37.	and genetic management plans shall be designed—	
38.	(i) to benefit, enhance, support, and otherwise recover	
39.	naturally spawning fish species to the point where	
40.	the measures provided under the Endangered Species	
41.	Act of 1973 (16 U.S.C. 1531 et seq.) are no longer	
42.	necessary; and	
43.	(ii) to minimize adverse effects to Central Valley Project	

1.	and State Water Project operations.	
2.		
3.	(C) PRIORITY; COOPERATIVE AGREEMENTS.—In	
4.	implementing this section, the Secretaries of the Interior and	
5.	Commerce—	
6.	(1) shall give priority to existing and prospective hatchery	
7.	programs and facilities within the Delta and the riverine	
8.	tributaries thereto; and	
9.	(2) may enter into cooperative agreements for the operation	
10.	of conservation hatchery programs with States, Indian	
11.	tribes, and other nongovernmental entities for the	
12.	benefit, enhancement, and support of naturally spawning	
13.	fish species.	
14.		
15.	(6) ACQUISITION OF LAND, WATER, OR INTERESTS FROM	
16.	WILLING SELLERS FOR ENVIRONMENTAL PURPOSES IN	
17.	CALIFORNIA.—	
18.		
19.	(A) IN GENERAL.—The Secretary of the Interior is authorized to	
20.	acquire by purchase, lease, donation, or otherwise, land, water, or	
21.	interests in land or water from willing sellers in California—	
22.	(1) to benefit listed or candidate species under the Endangered	
23.	Species Act of 1973 (16 U.S.C. 1531 et seq.) or the California	
24.	Endangered Species Act (California Fish and Game Code	
25.	sections 2050 through 2116);	
26.	(2) to meet requirements of, or otherwise provide water quality	
27.	benefits under, the Federal Water Pollution Control Act (33	
28.	U.S.C. 1251 et seq.) or the Porter Cologne Water Quality	
29.	Control Act (division 7 of the California Water Code); or	
30.	(3) for protection and enhancement of the environment, as	
31.	determined by the Secretary of the Interior.	
32.		
33.	(B) FINANCIAL ASSISTANCE.—In implementing this section, the	
34.	Secretary of the Interior is authorized to provide financial	
35.	assistance to the State of California or otherwise hold such	
36.	interests in joint ownership with the State of California based on a	
37.	cost share deemed appropriate by the Secretary.	
38.		
39.	(C) TREATMENT.—Any expenditures under this subsection shall	
40.	be nonreimbursable and nonreturnable to the United States.	
41.		
42.	(7) REAUTHORIZATION OF THE FISHERIES RESTORATION AND	
43.	IRRIGATION MITIGATION ACT OF 2000.	

TECHNICAL
CHANGE: The
Administration
pointed out
that, as drafted,
provision would
require
Administration
to complete
program within
about a month
and a half.

S. 2533 was
intended to give
Admin a year,
so we have
changed
accordingly.

1.		
2.	(A) Section 10(a) of the Fisheries Restoration and Irrigation	
3.	Mitigation Act of 2000 (16 U.S.C. 777 note; Public Law 106–	
4.	502) is amended by striking “\$25 million for each of fiscal years	
5.	2009 through 2015” and inserting “\$20 million through 2021”;	
6.	and	
7.	(B) Section 2 of the Fisheries Restoration and Irrigation Mitigation	
8.	Act of 2000 (16 U.S.C. 777 note; Public Law 106–502) is	
9.	amended by adding “California” after “Idaho.”	
10.		
11.	(c) Actions to benefit refuges.	
12.	(1) IN GENERAL.—In addition to funding under section 3407 of	
13.	the Central Valley Project Improvement Act (Public Law 102–	
14.	575; 106 Stat. 4726), there is authorized to be appropriated to	
15.	the Secretary of the Interior \$2,000,000 for each of fiscal years	
16.	2016 through 2020 for the acceleration and completion of water	
17.	infrastructure and conveyance facilities necessary to achieve full	
18.	water deliveries to Central Valley wildlife refuges and habitat	
19.	areas pursuant to section 3406(d) of that Act (Public Law 102–	
20.	575; 106 Stat. 4722).	
21.	(2) COST SHARING.—	
22.	(A) FEDERAL SHARE.—The Federal share of the cost of	
23.	carrying out an activity described in this section shall be not more	
24.	than 50 percent.	
25.	(B) NON-FEDERAL SHARE.—The non-Federal share of the	
26.	cost of carrying out an activity described in this section—	
27.	(i) shall be not less than 50 percent; and	
28.	(ii) may be provided in cash or in kind.	
29.		
30.	(d) Non-federal program to protect native anadromous fish in Stanislaus	
31.	River.	
32.	(1) DEFINITION OF DISTRICT.—In this section, the term “district”	
33.	means—	
34.	(A) the Oakdale Irrigation District of the State of California;	
35.	and	
36.	(B) the South San Joaquin Irrigation District of the State of	
37.	California.	
38.	(2) ESTABLISHMENT.—The Secretary of Commerce, acting	
39.	through the Assistant Administrator of the National Marine Fisheries	
40.	Service, and the districts, in consultation with the Director of the	
41.	California Department of Fish and Wildlife, shall jointly establish and	
42.	conduct a nonnative predator research and pilot fish removal program to	
43.	study the effects of removing from the Stanislaus River—	

1.	(A) nonnative striped bass, smallmouth bass, largemouth bass,	
2.	black bass; and	
3.	(B) other nonnative predator fish species.	
4.	(3) REQUIREMENTS.—The program under this section shall—	
5.	(A) be scientifically based, with research questions determined	
6.	jointly by—	
7.	(i) National Marine Fisheries Service scientists; and	
8.	(ii) technical experts of the districts;	
9.	(B) include methods to quantify by, among other things, evaluating	
10.	the number of juvenile anadromous fish that migrate past the	
11.	rotary screw trap located at Caswell—	
12.	(i) the number and size of predator fish removed each year;	
13.	and	
14.	(ii) the impact of the removal on—	
15.	(AA) the overall abundance of predator fish in the	
16.	Stanislaus River; and	
17.	(BB) the populations of juvenile anadromous fish in	
18.	the Stanislaus River;	
19.	(C) among other methods, consider using wire fyke trapping,	
20.	portable resistance board weirs, and boat electrofishing; and	
21.	(D) be implemented as quickly as practicable after the date of	
22.	issuance of all necessary scientific research permits.	
23.	(4) MANAGEMENT.—The management of the program shall be the	
24.	joint responsibility of the Assistant Administrator and the districts, which	
25.	shall—	
26.	(A) work collaboratively to ensure the performance of the	
27.	program; and	
28.	(B) discuss and agree on, among other things—	
29.	(i) qualified scientists to lead the program;	
30.	(ii) research questions;	
31.	(iii) experimental design;	
32.	(iv) changes in the structure, management, personnel,	
33.	techniques, strategy, data collection and access, reporting, and	
34.	conduct of the program; and	
35.	(v) the need for independent peer review.	
36.	(5) CONDUCT.—	
37.	(A) IN GENERAL.—For each applicable calendar year, the	
38.	districts, on agreement of the Assistant Administrator, may elect to	
39.	conduct the program under this section using—	
40.	(i) the personnel of the Assistant Administrator or	
41.	districts;	
42.	(ii) qualified private contractors hired by the districts;	
43.		

1.	(iii) personnel of, on loan to, or otherwise assigned to the	
2.	National Marine Fisheries Service; or	
3.	(iv) a combination of the individuals described in clauses	
4.	(i) through (iii).	
5.	(B) PARTICIPATION BY NATIONAL MARINE	
6.	FISHERIES SERVICE.—	
7.	(i) IN GENERAL.—If the districts elect to conduct the	
8.	program using district personnel or qualified private	
9.	contractors hired under clause (i) or (ii) of subparagraph (A),	
10.	the Assistant Administrator may assign an employee of, on	
11.	loan to, or otherwise assigned to the National Marine Fisheries	
12.	Service, to be present for all activities performed in the field to	
13.	ensure compliance with paragraph (4).	
14.	(ii) COSTS.—The districts shall pay the cost of	
15.	participation by the employee under clause (i), in accordance	
16.	with paragraph (6).	
17.		
18.	(c) TIMING OF ELECTION.—The districts shall notify the	
19.	Assistant Administrator of an election under subparagraph (A) by	
20.	not later than October 15 of the calendar year preceding the calendar	
21.	year for which the election applies.	
22.	(6) FUNDING.—	
23.	(A) IN GENERAL.—The districts shall be responsible for 100	
24.	percent of the cost of the program.	
25.	(B) CONTRIBUTED FUNDS.—The Secretary of Commerce	
26.	may accept and use contributions of funds from the districts to carry	
27.	out activities under the program.	
28.	(c) ESTIMATION OF COST.—	
29.	(i) IN GENERAL.—Not later than December 1 of each	
30.	year of the program, the Secretary of Commerce shall submit	
31.	to the districts an estimate of the cost to be incurred by the	
32.	National Marine Fisheries Service for the program during the	
33.	following calendar year, if any, including the cost of any data	
34.	collection and posting under paragraph (7).	
35.	(ii) FAILURE TO FUND.—If an amount equal to the	
36.	estimate of the Secretary of Commerce is not provided through	
37.	contributions pursuant to subparagraph (B) before December	
38.	31 of that calendar year—	
39.	(AA) the Secretary shall have no obligation to	
40.	conduct the program activities otherwise scheduled for	
41.	the following calendar year until the amount is	
42.	contributed by the districts; and	
43.		

1.	(BB) the districts may not conduct any aspect of the	
2.	program until the amount is contributed by the districts.	
3.	(D) ACCOUNTING.—	
4.	(i) IN GENERAL.—Not later than September 1 of each	
5.	year, the Secretary of Commerce shall provide to the districts	
6.	an accounting of the costs incurred by the Secretary for the	
7.	program during the preceding calendar year.	
8.	(ii) EXCESS AMOUNTS.—If the amount contributed by	
9.	the districts pursuant to subparagraph (B) for a calendar year	
10.	was greater than the costs incurred by the Secretary of	
11.	Commerce during that year, the Secretary shall—	
12.	(AA) apply the excess amounts to the cost of	
13.	activities to be performed by the Secretary under the	
14.	program, if any, during the following calendar year; or	
15.	(BB) if no such activities are to be performed, repay	
16.	the excess amounts to the districts.	
17.	(7) PUBLICATION AND EVALUATION OF DATA.—	
18.	(A) IN GENERAL.—All data generated through the program,	
19.	including by any private consultants, shall be routinely provided to	
20.	the Assistant Administrator.	
21.		
22.	(B) INTERNET.—Not later than the 15 th day of each month of	
23.	the program, the Assistant Administrator shall publish on the	
24.	Internet website of the National Marine Fisheries Service a tabular	
25.	summary of the raw data collected under the program during the	
26.	preceding month.	
27.	(C) REPORT.—On completion of the program, the Assistant	
28.	Administrator shall prepare a final report evaluating the	
29.	effectiveness of the program, including recommendations for future	
30.	research and removal work.	
31.	(8) CONSISTENCY WITH LAW.—	
32.	(A) IN GENERAL.—The programs in this section and section	
33.	204 are found to be consistent with the requirements of the Central	
34.	Valley Project Improvement Act (Public Law 102–575; 106 Stat.	
35.	4706).	
36.	(B) LIMITATION.—No provision, plan, or definition under	
37.	that Act, including section 3406(b)(1) of that Act (Public Law 102–	
38.	575; 106 Stat. 4714), shall be used—	
39.	(i) to prohibit the implementation of the programs in this	
40.	subsection and subsection (c); or	
41.	(ii) to prevent the accomplishment of the goals of the	
42.	programs.	
43.	(C) STATE LAW.—The Secretary of the Interior, the Secretary of	

1.	Commerce, and the participating districts shall comply with	
2.	applicable requirements of State law with respect to the program	
3.	under this subsection.	
4.		
5.	(e) Pilot Projects to Implement CALFED Invasive Species Program.	
6.		
7.	(1) IN GENERAL.—Not later than January 1, 2018, the Secretary	
8.	of the Interior, in collaboration with the Secretary of Commerce,	
9.	the Director of the California Department of Fish and Wildlife,	
10.	and other relevant agencies and interested parties, shall establish	
11.	and carry out pilot projects to implement the invasive species	
12.	control program under section 103(d)(6)(A)(iv) of Public Law	
13.	108–361 (118 Stat. 1690).	
14.	(2) REQUIREMENTS.—The pilot projects under this section	
15.	shall—	
16.	(A) seek to reduce invasive aquatic vegetation (such as water	
17.	hyacinth), predators, and other competitors that contribute to	
18.	the decline of native listed pelagic and anadromous species	
19.	that occupy the Sacramento and San Joaquin Rivers and	
20.	their tributaries and the Delta; and	
21.	(B) remove, reduce, or control the effects of species including	
22.	Asiatic clams, silversides, gobies, Brazilian water weed,	
23.	largemouth bass, smallmouth bass, striped bass, crappie,	
24.	bluegill, white and channel catfish, zebra and quagga	
25.	mussels, and brown bullheads.	
26.	(3) EMERGENCY ENVIRONMENTAL REVIEWS.—To expedite	
27.	environmentally beneficial programs in this title for the	
28.	conservation of threatened and endangered species, the	
29.	Secretaries of the Interior and Commerce shall consult with the	
30.	Council on Environmental Quality in accordance with section	
31.	1506.11 of title 40, Code of Federal Regulations (or successor	
32.	regulations), to develop alternative arrangements to comply with	
33.	the National Environmental Policy Act of 1969 (42 U.S.C. 4321	
34.	et seq.) for those programs.	
35.	(f) COLLABORATIVE PROCESSES.—Notwithstanding the Federal	
36.	Advisory Committee Act (5 U.S.C. App.) and applicable Federal	
37.	acquisitions and contracting authorities, the Secretaries of the	
38.	Interior and Commerce may use the collaborative processes under	
39.	the Collaborative Science Adaptive Management Program to enter	
40.	into contracts with specific individuals or organizations directly or	
41.	in conjunction with appropriate State agencies.	
42.		
43.	Sec. _ 12. OFFSETS.	

TECHNICAL
CHANGE: The
substance of
this language
was set forth in
subsection (a)
above and
section 3(g).

Administration
requested a
clear provision
regarding
successor BOs
and
reconsultation.

1.		
2.	(1) SHORT TITLE. This title may be cited as the “Accelerated	
3.	Revenue, Repayment, and Surface Water Storage Enhancement	
4.	Act”.	
5.	(2) Prepayment of certain repayment contracts between the United	
6.	States and contractors of federally developed water supplies.	
7.	(a) CONVERSION AND PREPAYMENT OF CONTRACTS.—	
8.	(1) CONVERSION.—Upon request of the contractor, the Secretary of	
9.	the Interior shall convert any water service contract in effect on the	
10.	date of enactment of this Act and between the United States and a	
11.	water users’ association to allow for prepayment of the repayment	
12.	contract pursuant to paragraph (2) under mutually agreeable terms	
13.	and conditions. The manner of conversion under this paragraph	
14.	shall be as follows:	
15.	(A) Water service contracts that were entered into under section 9	
16.	(c) of the Act of August 4, 1939 (53 Stat. 1196), to be	
17.	converted under this section shall be converted to repayment	
18.	contracts under section 9(d) of that Act (53 Stat. 1195).	
19.	(B) Water service contracts that were entered under subsection	
20.	(c)(2) of section 9 of the Act of August 4, 1939 (53 Stat. 1194),	
21.	to be converted under this section shall be converted to a	
22.	contract under subsection (c)(1) of section 9 of that Act (53	
23.	Stat. 1195).	
24.		
25.	(2) PREPAYMENT.—Except for those repayment contracts under	
26.	which the contractor has previously negotiated for prepayment, all	
27.	repayment contracts under section 9(d) of that Act (53 Stat. 1195)	
28.	in effect on the date of enactment of this Act at the request of the	
29.	contractor, and all contracts converted pursuant to paragraph	
30.	(1)(A) shall—	
31.	(A) provide for the repayment, either in lump sum or by accelerated	
32.	prepayment, of the remaining construction costs identified in water	
33.	project specific irrigation rate repayment schedules, as adjusted to	
34.	reflect payment not reflected in such schedule, and properly	
35.	assignable for ultimate return by the contractor, or if made in	
36.	approximately equal installments, no later than 3 years after the	
37.	effective date of the repayment contract, such amount to be	
38.	discounted by ½ the Treasury rate. An estimate of the remaining	
39.	construction costs, as adjusted, shall be provided by the Secretary	
40.	to the contractor no later than 90 days following receipt of request	
41.	of the contractor;	
42.	(B) require that construction costs or other capitalized costs incurred	
43.	after the effective date of the contract or not reflected in the rate	

1.	schedule referenced in subparagraph (A), and properly assignable	
2.	to such contractor shall be repaid in not more than 5 years after	
3.	notification of the allocation if such amount is a result of a	
4.	collective annual allocation of capital costs to the contractors	
5.	exercising contract conversation under this subsection of less than	
6.	\$5,000,000. If such amount is \$5,000,000 or greater, such cost shall	
7.	be repaid as provided by applicable reclamation law;	
8.	(C) provide that power revenues will not be available to aid in	
9.	repayment of construction costs allocated to irrigation under the	
10.	contract; and	
11.	(D) continue so long as the contractor pays applicable charges,	
12.	consistent with section 9(d) of the Act of August 4, 1939 (53 Stat.	
13.	1195), and applicable law.	
14.		
15.	(3) CONTRACT REQUIREMENTS.—Except for those repayment	
16.	contracts under which the contractor has previously negotiated for	
17.	prepayment, the following shall apply with regard to all repayment	
18.	contracts under subsection (c)(1) of section 9 of that Act (53 Stat.	
19.	1195) in effect on the date of enactment of this Act at the request	
20.	of the contractor, and all contracts converted pursuant to paragraph	
21.	(1)(B):	
22.	(A) Provide for the repayment in lump sum of the remaining	
23.	construction costs identified in water project specific municipal	
24.	and industrial rate repayment schedules, as adjusted to reflect	
25.	payments not reflected in such schedule, and properly assignable	
26.	for ultimate return by the contractor. An estimate of the remaining	
27.	construction costs, as adjusted, shall be provided by the Secretary	
28.	to the contractor no later than 90 days after receipt of request of	
29.	contractor.	
30.	(B) The contract shall require that construction costs or other	
31.	capitalized costs incurred after the effective date of the contract or	
32.	not reflected in the rate schedule referenced in subparagraph (A),	
33.	and properly assignable to such contractor, shall be repaid in not	
34.	more than 5 years after notification of the allocation if such amount	
35.	is a result of a collective annual allocation of capital costs to the	
36.	contractors exercising contract conversation under this subsection	
37.	of less than \$5,000,000. If such amount is \$5,000,000 or greater,	
38.	such cost shall be repaid as provided by applicable reclamation	
39.	law.	
40.		
41.	(C) Continue so long as the contractor pays applicable charges,	
42.	consistent with section 9 (c)(1) of the Act of August 4, 1939 (53	
43.	Stat. 1195), and applicable law.	

1.		
2.	(4) CONDITIONS.—All contracts entered into pursuant to paragraphs	
3.	(1), (2), and (3) shall—	
4.	(A) not be adjusted on the basis of the type of prepayment	
5.	financing used by the water users' association;	
6.		
7.	(B) conform to any other agreements, such as applicable settlement	
8.	agreements and new constructed appurtenant facilities; and	
9.		
10.	(C) (c)not modify other water service, repayment, exchange and	
11.	transfer contractual rights between the water users'	
12.	association, and the Bureau of Reclamation, or any rights,	
13.	obligations, or relationships of the water users' association and	
14.	their landowners as provided under State law.	
15.	(b) ACCOUNTING.—The amounts paid pursuant to subsection (a)	
16.	shall be subject to adjustment following a final cost allocation by	
17.	the Secretary of the Interior. In the event that the final cost	
18.	allocation indicates that the costs properly assignable to the	
19.	contractor are greater than what has been paid by the contractor,	
20.	the contractor shall be obligated to pay the remaining allocated	
21.	costs. The term of such additional repayment contract shall be not	
22.	less than one year and not more than 10 years, however, mutually	
23.	agreeable provisions regarding the rate of repayment of such	
24.	amount may be developed by the parties. In the event that the	
25.	final cost allocation indicates that the costs properly assignable to	
26.	the contractor are less than what the contractor has paid, the	
27.	Secretary shall credit such overpayment as an offset against any	
28.	outstanding or future obligation of the contractor, with the	
29.	exception of Restoration Fund charges pursuant to section	
30.	3407(d) of Public Law 102-575.	
31.		
32.	(c) APPLICABILITY OF CERTAIN PROVISIONS.—	
33.		
34.	(1) EFFECT OF EXISTING LAW.—Upon a contractor's	
35.	compliance with and discharge of the obligation of repayment	
36.	of the construction costs pursuant to a contract entered into	
37.	pursuant to subsection (a)(2)(A), subsections (a) and (b) of	
38.	section 213 of the Reclamation Reform Act of 1982 (96 Stat.	
39.	1269) shall apply to affected lands.	
40.	(2) EFFECT OF OTHER OBLIGATIONS.—The obligation of a	
41.	contractor to repay construction costs or other capitalized	
42.	costs described in subsection (a)(2)(B), (a)(3)(B), or (b) shall	
43.	not affect a contractor's status as having repaid all of the	

	<p>construction costs assignable to the contractor or the applicability of subsections (a) and (b) of section 213 of the Reclamation Reform Act of 1982 (96 Stat. 1269) once the amount required to be paid by the contractor under the repayment contract entered into pursuant to subsection (a)(2)(A) have been paid.</p>	
	<p>(d) EFFECT ON EXISTING LAW NOT ALTERED.—Implementation of the provisions of this title shall not alter—</p> <ol style="list-style-type: none"> (1) the repayment obligation of any water service or repayment contractor receiving water from the same water project, or shift any costs that would otherwise have been properly assignable to the water users’ association identified in subsections (a)(1), (a)(2), and (a)(3) absent this section, including operation and maintenance costs, construction costs, or other capitalized costs incurred after the date of the enactment of this Act, or to other contractors; and (2) specific requirements for the disposition of amounts received as repayments by the Secretary under the Act of June 17, 1902 (32 Stat. 388, chapter 1093), and Acts supplemental to and amendatory of that Act (43 U.S.C. 371 et seq.); (3) the priority of a water service or repayment contractor to receive water; or (4) except as expressly provided in this section, any obligations under the reclamation law, including the continuation of Restoration Fund charges pursuant to section 3407(d) (Public Law 102–575), of the water service and repayment contractors making prepayments pursuant to this section. <p>(e) DEFINITIONS.—For the purposes of this title, the following definitions apply:</p> <ol style="list-style-type: none"> (1) ACCOUNT.—The term “Account” means the Reclamation Water Storage Account established under subsection (c)(2). (2) CONSTRUCTION.—The term “construction” means the designing, materials engineering and testing, surveying, and building of water storage including additions to existing water storage and construction of new water storage facilities, exclusive of any Federal statutory or regulatory obligations relating to any permit, review, approval, or other such requirement. (3) WATER STORAGE.—The term “water storage” means any federally owned facility under the jurisdiction of the Bureau of Reclamation or any non-Federal facility used for the storage and supply of water resources. 	

- (4) **TREASURY RATE.**—The term “Treasury rate” means the 20-year Constant Maturity Treasury (CMT) rate published by the United States Department of the Treasury existing on the effective date of the contract.
- (5) **WATER USERS’ ASSOCIATION.**—The term “water users’ association” means—
 - (A) an entity organized and recognized under State laws that is eligible to enter into contracts with reclamation to receive contract water for delivery to and users of the water and to pay applicable charges; and
 - (B) includes a variety of entities with different names and differing functions, such as associations, conservatory district, irrigation district, municipality, and water project contract unit.

Sec. 13. SAVINGS LANGUAGE.

- (a) **IN GENERAL.**—This Act shall not be interpreted or implemented in a manner that—
 - (1) preempts or modifies any obligation of the United States to act in conformance with applicable State law, including applicable State water law;
 - (2) affects or modifies any obligation under the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4706), except for the savings provisions for the Stanislaus River predator management program expressly established by section 12(b);
 - (3) overrides, modifies, or amends the applicability of the Endangered Species Act of 1973 ([16 U.S.C. 1531 et seq.](#)) or the application of the smelt and salmonid biological opinions to the operation of the Central Valley Project or the State Water Project;
 - (4) would cause additional adverse effects on listed fish species beyond the range of effects anticipated to occur to the listed fish species for the duration of the applicable biological opinion, using the best scientific and commercial data available; or
 - (5) overrides, modifies, or amends any obligation of the Pacific Fisheries Management Council, required by the Magnuson Stevens Act or the Endangered Species Act, to manage fisheries off the coast of California, Oregon, or Washington.

	<p>(b) <u>SUCCESSOR BIOLOGICAL OPINIONS. —</u></p> <p>(1) <u>IN GENERAL. —The Secretaries of the Interior and Commerce shall apply this Act and its individual provisions to any successor biological opinions to the smelt or salmonid biological opinions unless only to the extent that the Secretaries determine specific provisions are inconsistent consistent with.</u></p> <p>(A) <u>the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), its implementing regulations, and the successor biological opinions; and</u></p> <p>(B) <u>Subsection (a)(4) above.</u></p> <p>(2) <u>LIMITATION. —Nothing in this Act shall restrict the Secretaries of the Interior and Commerce from completing consultation on successor biological opinions and through those successor biological opinions implementing whatever adjustments in operations or other activities as may be required by the Endangered Species Act and its implementing regulations.</u></p> <p>(c) SEVERABILITY.—If any provision of this Act, or any application of such provision to any person or circumstance, is held to be inconsistent with any law or the biological opinions, the remainder of this Act and the application of this Act to any other person or circumstance shall not be affected.</p> <p>Sec. <u>14</u>. DURATION.</p> <p>This Act shall expire on the date that is five years after the date of its enactment, with the exception of sections <u>5(a)</u>, 8 and 11(b).</p>	
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From: Heidi Pyle
Sent: Wednesday, November 23, 2016 11:39 AM
To: 'Johnny Amaral'; 'Gayle Holman'
CC: Michael Burns; Laura Murrell
Subject: WWD Rapid Response November 23

Good Morning,

Please see the below highlights from today's media.

Notable:

- [Sacramento Bee: Sports fishermen have rights, too](#)
 - "As the power of ESA has grown, it has left little room for broad thinking. A plan to sacrifice striped bass to marginally assist salmon and smelt was rejected by the California Fish and Game Commission. A focus on ridding our waters of fish introduced many lifetimes ago does little to move forward big ideas to improve the environment in a way that will benefit farmers, people and wildlife."
 - "Any realistic conservation plan must include economics and recreation. If solutions to protect endangered species lead to fewer game fish, then there will be a precipitous drop in fishing license and boating registration revenue."
- [LA Times: How pistachios and a prison are keeping a little California town afloat](#)
 - "Today Avenal is trying to rally around yet another next big thing, this one related to San Joaquin Valley agriculture and the globalizing economy: the explosion of acreage planted in hard nuts, almonds, walnuts and pistachios, much of it for export overseas, especially China."
- [Water Deeply: Allocating San Joaquin River Water to the Environment Shows Promise](#)
 - "Shared responsibility: Allocating a flexibly managed block of water to environmental uses would ensure that the environment is better integrated into the water rights system. Environmental water managers would have a seat at the table in water management, deciding how best to use their allocation just as other water users do, and the environmental water block would share equally in abundance and shortage along with other beneficial uses."
- Elk Grove News: [Westlands now-ex-lobbyist has been, and maybe still is, part of Trump team](#)
 - "The replacement of Bernhardt with Domenich followed in the wake of Rep. Jared Huffman (D-San Rafael) floating an amendment to stop former Westlands employees and lobbyists from overseeing a controversial Westlands irrigation drainage settlement if they were to join the Department of Interior leadership. The settlement legislation is strongly opposed by Restore the Delta and environmental groups, fishing organizations and the Hoopa Valley Tribe and other Tribes. Bernhardt's firm also dropped Westlands as a client. Although no longer in the leadership position, Bernhardt may still be on the transition team."
- [Sun Herald: Westlands now-ex-lobbyist has been, and maybe still is, part of Trump team](#)
 - "Bernhardt's withdrawal from Westlands more or less coincided with his being replaced as leader of the Interior Department transition operations by David Domenich, another former Interior Department official. It followed a purge of some lobbyists from transition teams and it came on the heels of Rep. Jared Huffman, D-San Rafael, floating an amendment to block former Westlands lobbyists and employees from overseeing a Westlands irrigation drainage plan if they were to join the Interior Department."
- [StreetsBlog: Interview With Out-Going Climate Champion State Senator Fran Pavley](#)
 - "Senator Pavley started by talking about her groundwater management bill, because, she said, "It doesn't get as much attention as all the climate things." With a growing population—"We are at 39 million people, moving probably in the next ten to fifteen years up to 50 million people"—California can't afford to ignore the problems inherent in its historical approach to water rights. "Water supply is certainly part of the discussion on how you strategically plan for that growth, along with transit along with other kinds of necessities.""

Best,

Heidi Pyle

KP PUBLIC AFFAIRS

1201 K Street, Suite 800, Sacramento, CA 95814
p. 916.448.2162 **d.** 916.498.7718 **f.** 916.448.4923
w. www.ka-pow.com **e.** hpyle@ka-pow.com

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From: Johnny Amaral

Sent: Friday, November 25, 2016 3:17 PM

To: Bernhardt, David L.; Birmingham Tom; Dpope@westlandswater.org; Gayle Holman; Jose Gutierrez; Michael Burns; cjensen@ka-pow.com; dcardoza@foley.com; drehberg@mercuryllc.com; emanning@ka-pow.com

Subject: Email issues

Team,

I just realized I'm having some email issues with my Westlands email account. I have not received any emails since yesterday morning. If you need to reach me, either call my cell phone, email me at this account, or text me.

From: Johnny Amaral

Sent: Monday, November 28, 2016 4:31 PM

To: Tom Birmingham; David Bernhardt

Subject: do we have an opinion about Randy Fiorini?

From: Tom Birmingham
Sent: Monday, November 28, 2016 4:47 PM
To: Johnny Amaral
CC: David Bernhardt
Subject: Re: do we have an opinion about Randy Fiorini?

Yes, Randy is a good guy.

Sent from my iPhone

On Nov 28, 2016, at 3:30 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

From: Johnny Amaral
Sent: Monday, November 28, 2016 6:00 PM
To: Karen Clark
Subject: Re: Departure Date on Hotel Reservation

I'm not really sure either. But I can ask Ken Khachigian or David Bernhardt what it is

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

On Nov 28, 2016, at 4:45 PM, Karen Clark <kclark@westlandswater.org> wrote:

Hi J,

See below. I don't know what this is about. Do you?

~Karen
Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) [REDACTED]
(f) 559.241.6277
Email: kclark@westlandswater.org

From: Gary Esajian [<mailto:gesajian@westlandswater.org>]
Sent: Monday, November 28, 2016 4:23 PM
To: Karen Clark
Subject: Re: Departure Date on Hotel Reservation

Karen: for the Brownstein event tomorrow can you rsvp for Todd and I please. Gary

Sent from my iPhone

On Nov 28, 2016, at 2:04 PM, Karen Clark <kclark@westlandswater.org> wrote:

Hi Gary and Todd,

Just wanted to let you know that I contacted the hotel by phone and changed your departure dates for the ACWA Conference/Marriott to December 1. Let me know if you need anything else.

Thanks!

~Karen
Karen Clark
Executive Assistant to Thomas W. Birmingham

Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) 559.230.9470
(f) 559.241.6277
Email: kclark@westlandswater.org

From: Johnny Amaral
Sent: Monday, November 28, 2016 6:01 PM
To: Ken Khachigian; David L. Bernhardt
Subject: Fwd: Departure Date on Hotel Reservation

Gentlemen,

Is your firm having a reception at the acwa conference this week? If so, can you make sure that Gary and Todd are on the guest list? As an FYI, I will not be attending the conference as I have too much happening here in the valley to be away for three days.

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

Begin forwarded message:

From: Karen Clark <kclark@westlandswater.org>
Date: November 28, 2016 at 4:45:13 PM PST
To: Johnny Amaral <jamaral@westlandswater.org>
Subject: FW: Departure Date on Hotel Reservation

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~Karen
Karen Clark
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P.O. Box 6056

Fresno, CA 93703

(c) 559.230.9470

(f) 559.241.6277

Email: kclark@westlandswater.org

From: Khachigian, Kenneth
Sent: Monday, November 28, 2016 6:13 PM
To: Johnny Amaral; Bernhardt, David L.
Subject: Re: Departure Date on Hotel Reservation

I already took care of this a couple of weeks ago.....I'll be sure they're properly received. You're missing a good party.

KK



Kenneth L. Khachigian
Senior Partner

Brownstein Hyatt Farber Schreck, LLP
300 So. El Camino Real, Suite 203
San Clemente, CA 92672

949.498.3879 tel
949.498.6197 facsimile

kkhachigian@bhfs.com
Web Site: www.bhfs.com

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From: Johnny Amaral <jamaral@westlandswater.org>
Date: Monday, November 28, 2016 at 5:01 PM
To: Kenneth Khachigian <KKhachigian@bhfs.com>, "Bernhardt, David L." <DBernhardt@BHFS.com>
Subject: Fwd: Departure Date on Hotel Reservation

Gentlemen,

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From: Johnny Amaral
Sent: Monday, November 28, 2016 6:27 PM
To: Khachigian, Kenneth
CC: Bernhardt, David L.
Subject: Re: Departure Date on Hotel Reservation

Sorry I won't be there Ken. I would love to be able to catch up with you. Hopefully very very soon!!

Make sure to take good care of my guys

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

On Nov 28, 2016, at 5:13 PM, Khachigian, Kenneth <KKhachigian@bhfs.com> wrote:

I already took care of this a couple of weeks ago....I'll be sure they're properly received. You're missing a good party.

KK

<image001.png>

Kenneth L. Khachigian
Senior Partner

Brownstein Hyatt Farber Schreck, LLP
300 So. El Camino Real, Suite 203
San Clemente, CA 92672

949.498.3879 tel
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From: Johnny Amaral <jamara1@westlandswater.org>
Date: Monday, November 28, 2016 at 5:01 PM
To: Kenneth Khachigian <KKhachigian@bhfs.com>, "Bernhardt, David L." <DBernhardt@BHFS.com>
Subject: Fwd: Departure Date on Hotel Reservation

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From: "Khachigian, Kenneth" <KKhachigian@bhfs.com>
Date: November 28, 2016 at 5:13:04 PM PST
To: Johnny Amaral <jamaral@westlandswater.org>, "Bernhardt, David L." <DBernhardt@BHFS.com>
Subject: Re: Departure Date on Hotel Reservation

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Kenneth L. Khachigian
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From: Johnny Amaral
Sent: Wednesday, November 30, 2016 10:03 AM
To: David L. Bernhardt
Subject: Conf call

Do you have time to do a call with me and Anthony Ratekin from Nunes office. Maybe around 9:15 PST?

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

From: Bernhardt, David L.
Sent: Wednesday, November 30, 2016 10:07 AM
To: 'Johnny Amaral'
Subject: RE: Conf call

I would have 15 minutes.

-----Original Message-----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Wednesday, November 30, 2016 12:04 PM
To: Bernhardt, David L.
Subject: Conf call

Do you have time to do a call with me and Anthony Ratekin from Nunes office. Maybe around 9:15 PST?

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

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From: Johnny Amaral
Sent: Wednesday, November 30, 2016 10:10 AM
To: 'Bernhardt, David L.'
Subject: RE: Conf call

That's fine. It wont even take that long. Can we use the Monday morning conf call line?

-----Original Message-----

From: Bernhardt, David L. [<mailto:DBernhardt@BHFS.com>]
Sent: Wednesday, November 30, 2016 9:07 AM
To: 'Johnny Amaral'
Subject: RE: Conf call

I would have 15 minutes.

-----Original Message-----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Wednesday, November 30, 2016 12:04 PM
To: Bernhardt, David L.
Subject: Conf call

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Johnny Amaral
Deputy General Manager - External Affairs Westlands Water District

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From: Bernhardt, David L.
Sent: Wednesday, November 30, 2016 10:13 AM
To: Johnny Amaral
Subject: Re: Conf call

Yes

David Bernhardt

> On Nov 30, 2016, at 12:08 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

> That's fine. It wont even take that long. Can we use the Monday morning conf call line?

>

> -----Original Message-----

> From: Bernhardt, David L. [<mailto:DBernhardt@BHFS.com>]

> Sent: Wednesday, November 30, 2016 9:07 AM

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> Johnny Amaral

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From: Johnny Amaral
Sent: Wednesday, November 30, 2016 10:14 AM
To: 'Bernhardt, David L.'
Subject: RE: Conf call

The call will be from 9:20-9:30 PST. Use the Monday morning call in number

-----Original Message-----

From: Bernhardt, David L. [<mailto:DBernhardt@BHFS.com>]
Sent: Wednesday, November 30, 2016 9:07 AM
To: 'Johnny Amaral'
Subject: RE: Conf call

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From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Wednesday, November 30, 2016 12:04 PM
To: Bernhardt, David L.
Subject: Conf call

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You calling in?

Best,

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Westlands Water District

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> Yes

>

> David Bernhardt

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From: Bernhardt, David L.
Sent: Wednesday, November 30, 2016 10:24 AM
To: Johnny Amaral
Subject: Re: Conf call

I must have called the wrong number

David Bernhardt

> On Nov 30, 2016, at 12:23 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

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> You calling in?

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> Westlands Water District

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>> On Nov 30, 2016, at 9:13 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

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>> Yes

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>>> Deputy General Manager - External Affairs Westlands Water District

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From: Johnny Amaral
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866. [REDACTED]:
[REDACTED]

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Yes

David Bernhardt

On Nov 30, 2016, at 12:08 PM, Johnny Amaral
<jamaral@westlandswater.org> wrote:

That's fine. It wont even take that long. Can we
use the Monday morning conf call line?

-----Original Message-----

From: Bernhardt, David L.
[<mailto:DBernhardt@BHFS.com>]
Sent: Wednesday, November 30, 2016 9:07 AM
To: 'Johnny Amaral'
Subject: RE: Conf call

I would have 15 minutes.

-----Original Message-----

From: Johnny Amaral
[<mailto:jamaral@westlandswater.org>]
Sent: Wednesday, November 30, 2016 12:04 PM
To: Bernhardt, David L.
Subject: Conf call

Do you have time to do a call with me and Anthony
Ratekin from Nunes office. Maybe around 9:15
PST?

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

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From: Johnny Amaral
Sent: Wednesday, November 30, 2016 3:11 PM
To: David Bernhardt; Tom Birmingham
Subject: do we have an opinion of this man?

Cliff Young. President of the West Valley Water District. Former San Bernardino County Supervisor.

<http://ca-westvalleywaterdistrict.civicplus.com/directory.aspx?EID=11>

From: Bernhardt, David L.
Sent: Thursday, December 1, 2016 5:00 PM
To: 'Johnny Amaral'
Subject: FYI

FRIDAY, DECEMBER 2ND

On Friday, the House will meet at 9:00 a.m. for legislative business. First and last votes are expected at 11:00 a.m. - 12:00 p.m.

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From: Bernhardt, David L.
Sent: Friday, December 2, 2016 10:10 AM
To: Thomas W. (Tom) Birmingham Esq.
Subject: H. Dale Hall
Attachments: H. Dale Hall.vcf; ATT00001.txt

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BEGIN:VCARD
VERSION:3.0
PRODID:-//Apple Inc.//iPhone OS 10.0.2//EN
N:Hall;H.;Dale;;
FN: H. Dale Hall
ORG:Ducks Unlimited;
TITLE:CEO
EMAIL;type=INTERNET;type=pref:dhall@ducks.org
TEL;type=WORK;type=VOICE;type=pref:901-758-3700
TEL;type=CELL;type=VOICE:901-████-████
ADR;type=WORK;type=pref:;;One Waterfowl
Way;Memphis;Tennessee;38120;United States of America
item1.URL;type=pref:www.ducks.org
item1.X-ABLabel:_\$!<HomePage>!\$_
END:VCARD

David Bernhardt

From: Johnny Amaral
Sent: Friday, December 2, 2016 3:40 PM
To: David Bernhardt
Subject: fyi

Two of our board members had dinner this week with one of the partners at bhfs at the ACWA conference. Don't let me forget to talk to you about what he said to them the next time we talk

From: Bernhardt, David L.
Sent: Friday, December 2, 2016 4:22 PM
To: 'Johnny Amaral'
Subject: RE: still on with Tom?

Ill call u in a minute

From: Johnny Amaral [mailto:jamaral@westlandswater.org]
Sent: Friday, December 02, 2016 6:23 PM
To: Bernhardt, David L.
Subject: still on with Tom?

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From: Johnny Amaral

Sent: Friday, December 2, 2016 4:23 PM

To: David Bernhardt

Subject: still on with Tom?

From: Johnny Amaral
Sent: Friday, December 2, 2016 4:25 PM
To: 'Bernhardt, David L.'
Subject: RE: still on with Tom?

Ok. Call 559- [REDACTED] - [REDACTED]

From: Bernhardt, David L. [mailto:DBernhardt@BHFS.com]
Sent: Friday, December 2, 2016 3:22 PM
To: 'Johnny Amaral'
Subject: RE: still on with Tom?

Ill call u in a minute

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Friday, December 02, 2016 6:23 PM
To: Bernhardt, David L.
Subject: still on with Tom?

STATEMENT OF CONFIDENTIALITY & DISCLAIMER: The information contained in this email message is attorney privileged and confidential, intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this email is strictly prohibited. If you have received this email in error, please notify us immediately by calling (303)-223-1300 and delete the message. Thank you.

From: Johnny Amaral

Sent: Friday, December 2, 2016 5:53 PM

To: rpatterson@mwdh2o.com; Brent 'Walthall; Dan Vink; Jason R. Phillips; dorth@davidorthconsulting.com; Thomas Birmingham; Steve Chedester; Jeff Sutton

CC: David Bernhardt; Mike Burns

Subject: Letter

Attachments: California Congressional Delegation.docx; Untitled attachment 17270.txt

Gents,

This is obviously in about of a holding pattern given what's transpired. But please take a look at the attached and let me know if it works for you.

The date will be changed to reflect the day it's sent. Maybe Monday. We will see.



Westlands Water District



SOUTH VALLEY WATER ASSOCIATION



December 2, 2016

Dear California Congressional Delegation:

We are writing this letter to express our great appreciation for the action you have taken to address operations of California's water infrastructure in the 114th Congress. If Congress had failed to act, the state ran the risk of losing the ability to deliver water to areas that have suffered socially and economically as a result of water supply shortages and to replenish reservoirs and groundwater levels that provide critical supplies during the months of low precipitation.

The undersigned water agencies, stretching from northern to southern California, have reviewed the legislative language related to Central Valley Project (CVP) and State Water Project (SWP) operations, and we believe it reflects a compromise that will serve all Californians by increasing the potential for improved water supplies for communities throughout the state.

The language improves dramatically the flexibility to federal and state agencies to operate the water projects in order to maximize the water available to urban and rural water agencies, while at the same time protecting listed fish species. The language protects the rights of the water users upstream of the Delta and does not amend the Endangered Species Act.

We greatly appreciate your efforts and support enactment of the legislation.

Respectfully,

Friant North Authority
Friant Water Authority
Kern County Water Agency
Metropolitan Water District
San Joaquin River Exchange Contractors
South Valley Water Association
Tehama Colusa Canal Authority
Westlands Water District

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

From: Patterson,Roger K

Sent: Friday, December 2, 2016 8:41 PM

To: Johnny Amaral

CC: Brent 'Walthall'; Dan Vink; Jason R. Phillips; dorth@davidorthconsulting.com; Thomas Birmingham; Steve Chedester; Jeff Sutton; David Bernhardt; Mike Burns

Subject: Re: Letter

Looks good. Thanks.

> On Dec 2, 2016, at 5:09 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

> Gents,

>

> This is obviously in about of a holding pattern given what's transpired. But please take a look at the attached and let me know if it works for you.

>

> The date will be changed to reflect the day it's sent. Maybe Monday. We will see.

>

> <California Congressional Delegation.docx>

> <ATT00001>

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From: Dan Vink
Sent: Saturday, December 3, 2016 9:32 AM
To: jamaral@westlandswater.org
CC: rpatterson@mwdh2o.com; Brent 'Walthall'; Jason R. Phillips; David Orth; Tom Birmingham; Steve Chedester; Jeff Sutton; David Bernhardt; Mike Burns
Subject: Re: Letter

Works for me.

Thanks Johnny

Dan Vink
Executive Director
South Valley Water Association

dvink@svwater.org



On Dec 2, 2016, at 4:53 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

Gents,

This is obviously in about of a holding pattern given what's transpired. But please take a look at the attached and let me know if it works for you.

The date will be changed to reflect the day it's sent. Maybe Monday. We will see.

<California Congressional Delegation.docx>

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

From: Johnny Amaral
Sent: Saturday, December 3, 2016 10:18 AM
To: Ratekin, Anthony
CC: Tom Birmingham; David L. Bernhardt
Subject: Re: Today

Yes I am available. But we need to check David Bernhardt's availability as well. Tom?

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

> On Dec 3, 2016, at 9:06 AM, Ratekin, Anthony <Anthony.Ratekin@mail.house.gov> wrote:
>
> Do you have time to get on a call with Devin and me at 12:30?
>
> Anthony Ratekin
> Chief of Staff
> Rep. Devin Nunes

From: jsutton@tccanal.com
Sent: Saturday, December 3, 2016 10:57 AM
To: Dan Vink; jamaral@westlandswater.org
CC: rpatterson@mwdh2o.com; Brent 'Walthall'; Jason R. Phillips; David Orth; Tom Birmingham; Steve Chedester; David Bernhardt; Mike Burns
Subject: Re: Letter

Looks great.

Sent from my BlackBerry 10 smartphone.

From: Dan Vink
Sent: Saturday, December 3, 2016 8:33 AM
To: jamaral@westlandswater.org
Cc: rpatterson@mwdh2o.com; Brent 'Walthall'; Jason R. Phillips; David Orth; Tom Birmingham; Steve Chedester; Jeff Sutton; David Bernhardt; Mike Burns
Subject: Re: Letter

Works for me.

Thanks Johnny

Dan Vink
Executive Director
South Valley Water Association

dvink@svwater.org



On Dec 2, 2016, at 4:53 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

Gents,

This is obviously in about of a holding pattern given what's transpired. But please take a look at the attached and let me know if it works for you.

The date will be changed to reflect the day it's sent. Maybe Monday. We will see.

<California Congressional Delegation.docx>

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

From: David Orth
Sent: Sunday, December 4, 2016 9:48 AM
To: 'Johnny Amaral'
Subject: RE: Letter

This works for FNA by the way. . . .

-----Original Message-----

From: Johnny Amaral [<mailto:jamaral@westlandswater.org>]
Sent: Friday, December 2, 2016 4:53 PM
To: rpatterson@mwdh2o.com; Brent' Walthall <bwalthall@kcwa.com>; Dan Vink <dvink@svwater.org>; Jason R. Phillips <jphillips@friantwater.org>; dorth@davidorthconsulting.com; Thomas Birmingham <tbirmingham@westlandswater.org>; Steve Chedester <schedester@sjrecwa.net>; Jeff Sutton <jsutton@tccanal.com>
Cc: David Bernhardt <dbernhardt@bhfs.com>; Mike Burns <mburns@ka-pow.com>
Subject: Letter

Gents,

This is obviously in about of a holding pattern given what's transpired.
But please take a look at the attached and let me know if it works for you.

The date will be changed to reflect the day it's sent. Maybe Monday. We will see.

From: Karen Clark

Sent: Monday, December 5, 2016 11:33 AM

To: 'Alison MacLeod'; 'Carmela McHenry'; 'Carolyn Jensen'; Catherine Karen; Dan Pope; 'David Bernhardt'; Dennis Cardoza; Denny Rehberg; 'Ed Manning'; 'Gayle Holman'; Jennifer Walsh; Johnny Amaral; 'Mike Burns'; Sheila Greene; Shelley Ostrowski

CC: Karen Clark

Subject: Strategy Session in January

All,

I am in the process of scheduling an all day PR/Legislation Strategy Session in January to be held in Sacramento at KP Communications.

Please email me your availability for the following dates:

January 18

January 24

January 25

January 26

January 30

January 31

February 1

Thanks!

~Karen

Karen Clark

Executive Assistant to Thomas W. Birmingham

Westlands Water District

P.O. Box 6056

Fresno, CA 93703

(c) 559.230.9470

(f) 559.241.6277

Email: kclark@westlandswater.org

From: Johnny Amaral

Sent: Monday, December 5, 2016 11:36 AM

To: Tom Birmingham; Dennis Cardoza; Denny Rehberg; David Bernhardt; 'Smith, Ryan A.'; Catherine Karen

Subject: McCarthy sees minor, bipartisan drought measure in lame duck

AGENDA

McCarthy sees minor, bipartisan drought measure in lame duck

[George Cahlink](#), E&E News reporter

Published: Monday, December 5, 2016

House Majority Leader Kevin McCarthy expects a water projects bill to pass the House this week containing modest provisions to address the ongoing California drought.

"The long-term drought legislation will have to wait until next year," the California Republican told reporters earlier today. But, he said, he expects the Water Resources Development Act measure due out today to contain a smaller, bipartisan agreement on the drought.



House Majority Leader Kevin McCarthy (R-Calif.). Photo courtesy of @kevinomccarthy via Twitter.

"The rainy season does not wait for Congress; you have a couple months early [in the year] where if you miss having some piece of legislation, you would miss the opportunity to store the water in California," McCarthy added.

A McCarthy aide said the bipartisan provision — which was worked out with Sen. Dianne Feinstein (D-Calif.) — would likely provide the state authorities it needs to continue to collect and pump water. Similar provisions have moved in other year-end packages in recent years.

Aside from WRDA, McCarty said, the House is expecting to move a stopgap spending bill by Thursday before wrapping up the session. He said the spending legislation, known as a continuing resolution (CR), is being finalized and will likely be out tomorrow.

Negotiators are still hammering out how long the CR will extend into next spring and what add-on riders it might contain. Among the provisions in play are tax extenders, elements of an energy reform package and language to allow the U.S. Export-Import Bank to resume full operations.

Congress needs to pass a stopgap by Friday, when the current CR expires, or face a government shutdown. The temporary spending measures are needed because lawmakers have passed only one of their 12 fiscal 2017 spending bills, leaving agencies like U.S. EPA and the Interior and Energy departments to operate under fiscal 2016 funding levels.

Twitter: [@GeorgeCahlink](#) Email: gcahlink@eenews.net

From: Shelley Ostrowski
Sent: Monday, December 5, 2016 11:39 AM
To: 'Karen Clark'
Subject: RE: Strategy Session in January

Any of those days works for me.

Thanks!

Shelley Ostrowski, Esq.
Westlands Water District
Office: 916-321-4225

From: Karen Clark [mailto:kclark@westlandswater.org]
Sent: Monday, December 5, 2016 10:33 AM
To: 'Alison MacLeod'; 'Carmela McHenry'; 'Carolyn Jensen'; Catherine Karen; Dan Pope; 'David Bernhardt'; Dennis Cardoza; Denny Rehberg; 'Ed Manning'; 'Gayle Holman'; Jennifer Walsh; Johnny Amaral; 'Mike Burns'; Sheila Greene; Shelley Ostrowski
Cc: Karen Clark
Subject: Strategy Session in January

All,

I am in the process of scheduling an all day PR/Legislation Strategy Session in January to be held in Sacramento at KP Communications.

Please email me your availability for the following dates:

January 18

January 24

January 25

January 26

January 30

January 31

February 1

Thanks!

~Karen

Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) 559.230.9470
(f) 559.241.6277

Email: kclark@westlandswater.org

From: DCardoza@foley.com
Sent: Monday, December 5, 2016 11:42 AM
To: 'Karen Clark'
Subject: RE: Strategy Session in January

I presently know of no conflicts on these dates. Dennis

From: Karen Clark [mailto:kclark@westlandswater.org]
Sent: Monday, December 05, 2016 1:33 PM
To: 'Alison MacLeod'; 'Carmela McHenry'; 'Carolyn Jensen'; Catherine Karen; Dan Pope; 'David Bernhardt'; Cardoza, Dennis A.; Denny Rehberg; 'Ed Manning'; 'Gayle Holman'; Walsh, Jennifer F.; Johnny Amaral; 'Mike Burns'; Sheila Greene; Shelley Ostrowski
Cc: Karen Clark
Subject: Strategy Session in January

All,

I am in the process of scheduling an all day PR/Legislation Strategy Session in January to be held in Sacramento at KP Communications.

Please email me your availability for the following dates:

January 18

January 24

January 25

January 26

January 30

January 31

February 1

Thanks!

~Karen

Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) 559.230.9470
(f) 559.241.6277
Email: kclark@westlandswater.org

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From: Gayle Holman
Sent: Monday, December 5, 2016 11:45 AM
To: 'Karen Clark'
Subject: RE: Strategy Session in January

Hi Karen: See my availability below.

Gayle

Gayle Holman
Public Affairs Representative
Westlands Water District
3130 N. Fresno Street
P.O. Box 6056
Fresno, CA 93703-6056
(559) 241-6233 (direct)
(559) [REDACTED] - [REDACTED] (cell)
(559) 241-6277 (fax)
gholman@westlandswater.org

From: Karen Clark [mailto:kclark@westlandswater.org]
Sent: Monday, December 5, 2016 10:33 AM
To: 'Alison MacLeod'; 'Carmela McHenry'; 'Carolyn Jensen'; Catherine Karen; Dan Pope; 'David Bernhardt'; Dennis Cardoza; Denny Rehberg; 'Ed Manning'; 'Gayle Holman'; Jennifer Walsh; Johnny Amaral; 'Mike Burns'; Sheila Greene; Shelley Ostrowski
Cc: Karen Clark
Subject: Strategy Session in January

All,

I am in the process of scheduling an all day PR/Legislation Strategy Session in January to be held in Sacramento at KP Communications.

Please email me your availability for the following dates:

January 18 – **not** available (at Ag Leadership Seminar in Pomona)

January 24 -available

January 25 - available

January 26 - available

January 30 - available

January 31 - available

February 1 - available

Thanks!

~Karen

Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) 559.230.9470
(f) 559.241.6277
Email: kclark@westlandswater.org

From: Carmela McHenry
Sent: Monday, December 5, 2016 1:04 PM
To: 'Karen Clark'
Subject: RE: Strategy Session in January

Hi Karen:

Happy Holidays!! Hope this email finds you well. ☺

At your request --- As of today (12/5), the following dates will work for KP Public Affairs to schedule an all-day PR/Legislation Strategy Session.

January 25

January 30

January 31

February 1

If you have any questions, please let me know.

Thank you,

Carmela

Carmela McHenry

KP PUBLIC AFFAIRS

1201 K Street, Suite 800, Sacramento, CA 95814

p. 916.448.2162 f. 916.448.4923

w. www.ka-pow.com e. cmchenry@ka-pow.com

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From: Karen Clark [mailto:kclark@westlandswater.org]

Sent: Monday, December 05, 2016 10:33 AM

To: Alison MacLeod; Carmela McHenry; Carolyn Jensen; Catherine Karen; Dan Pope; 'David Bernhardt'; Dennis Cardoza; Denny Rehberg; Ed Manning; 'Gayle Holman'; Jennifer Walsh; Johnny Amaral; Michael Burns; Sheila Greene; Shelley Ostrowski

Cc: Karen Clark

Subject: Strategy Session in January

All,

I am in the process of scheduling an all day PR/Legislation Strategy Session in January to be held in Sacramento at KP Communications.

Please email me your availability for the following dates:

January 18

January 24

January 25

January 26

January 30

January 31

February 1

Thanks!

~Karen

Karen Clark

Executive Assistant to Thomas W. Birmingham

Westlands Water District

P.O. Box 6056

Fresno, CA 93703

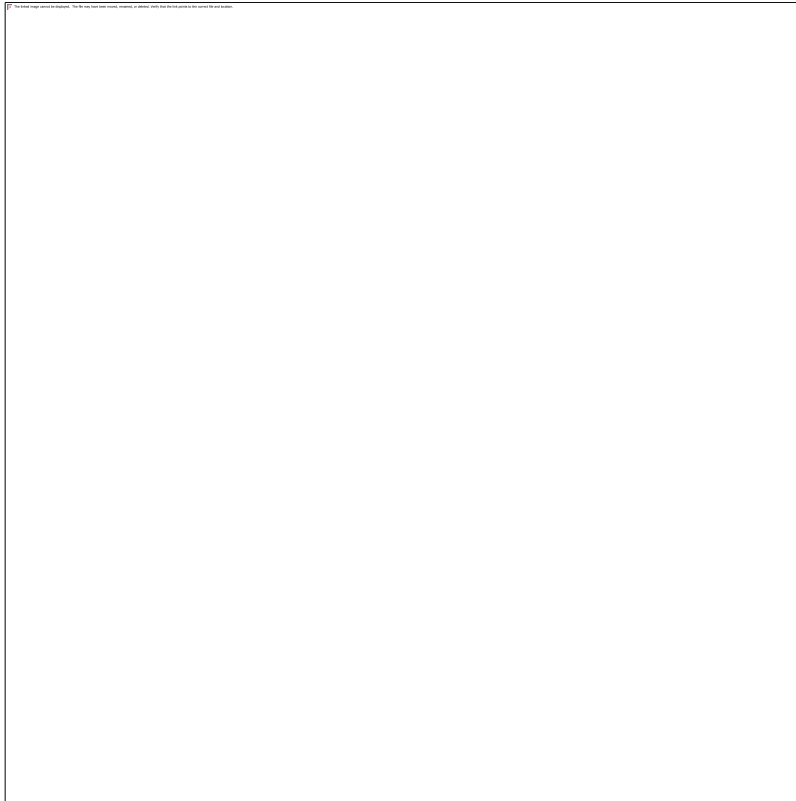
(c) 559.230.9470

(f) 559.241.6277

Email: kclark@westlandswater.org

From: Bernhardt, David L.
Sent: Monday, December 5, 2016 1:19 PM
To: 'Johnny Amaral'
Subject: FW: House to Vote on California Water Provisions

From: McCarthy Press Shop [mailto:mccarthypressShop@mail.house.gov]
Sent: Monday, December 05, 2016 3:09 PM
To: Bernhardt, David L.
Subject: House to Vote on California Water Provisions



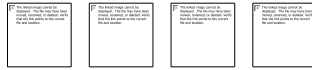
Press Office
December 5, 2016

Mike Long, Matt Sparks
[View Online](#)

McCarthy Supports California Drought Language in Water Bill

WASHINGTON, DC – Today, legislation to bring water to California communities was introduced. This legislative language will be included in the FY17 Water Resources Development Act (WRDA) which will be voted on this week by the House and Senate. It is a byproduct of bipartisan negotiations between the House and Senate. Majority Leader McCarthy released the following statement on the bipartisan agreement:

“After years of hard work with countless constituencies, Congress is ready to pass a California water deal. This legislation will bring more water to our communities and supports critical storage projects. It also provides resources for water desalination, conservation, efficiency, and recycling projects. Getting to this point has not been easy, but the collective commitment to provide relief to our state and local communities has proved resilient. This is an important moment for California, and the timing of this deal is critical—we cannot afford to miss capturing water from storms during this wet season. The agreement could not have been finalized without Senator Dianne Feinstein, and I am proud to have worked with her on this legislation. Our work on California water is by no means complete, but this deal signals that there is a path to getting more done to restore California’s greatness.”



Majority Leader Press Office
H-107 | The Capitol
202-225-4000
majorityleader.gov

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From: Bernhardt, David L.
Sent: Monday, December 5, 2016 1:27 PM
To: 'Johnny Amaral'
Subject: FW: Feinstein Supports Drought Language in Water Resources Development Act

FYI

Subject: FW: Feinstein Supports Drought Language in Water Resources Development Act



For Immediate Release
December 5, 2016

Contact: Tom Mentzer
(202) 224-9629

Feinstein Supports Drought Language in Water Resources Development Act

Bill includes both long-term, short-term provisions

\$558 million for storage, desalination, recycling, fish, wildlife protection programs

Fully complies with all state, federal law including Endangered Species Act, biological opinions

Washington—Senator Dianne Feinstein (D-Calif.) today announced her support for drought language in the *Water Resources Development Act*, a bill that authorizes water projects across the country. Broadly based on Feinstein's February 2016 legislation, the drought language is the result of three years of work, more than 50 drafts and vigorous consultation with federal agencies and the White House to ensure the bill complies with environmental laws including the *Endangered Species Act* and biological opinions.

Senator Feinstein released the following statement:

"The question I ask myself about this bill is will it help California? Will the \$558 million in long-term authorizations help California develop a new water infrastructure? Will the short-term operational improvements help us hold more water in a way that does not negatively affect fish or the environment? I believe the answer is yes.

This bill isn't perfect but I do believe it will help California and it has bipartisan support including Republicans and Democrats in the House, and that's why I'm supporting it.

After three years and dozens of versions of legislation, I think this is the best we can do. If we don't move now, we run the real risk of legislation that opens up the *Endangered Species Act* in the future, when Congress will again be under Republican control, this time backed by a Trump administration.

As a result of our work with experts from federal and state agencies, we have included strong savings clauses and environmental protections to ensure this bill is entirely within the bounds of both the *Endangered Species Act* and relevant biological opinions. The bill also includes \$43 million for important programs to restore salmon and smelt and to benefit refuges. But those environmental protections certainly won't be included if a new bill is drafted next year by the Republican majority.

Action is long overdue. California is entering its sixth year of drought. Experts state it will take four or more years to recover. We are seeing water wells in the thousands running dry. At the same time, smelt populations have plummeted to historic lows and salmon populations are struggling.

I know that we absolutely can protect California's environment and wildlife while improving how we move and store water in California. After all, the state is home to 40 million people, but we have essentially the same water system we had five decades ago when the population was 16 million people.

To address the demands of population growth and climate change, we must make sure we can store water from wet years for use in dry years and stretch our existing supplies through conservation, recycling and desalination.

And this bill does that with both long-term and short-term provisions as well as strong environmental protections.

The long-term provisions are centered around \$558 million that will help supplement state and local funding to build the 137 projects identified by the Feinstein drought bill introduced in February (S. 2533). Those projects—desalination, recycling and reuse—could produce upwards of 1.4 million acre feet of water, enough for 2.8 million households. \$335 million is included for storage, funds that will go a long way toward preparing for future dry years, and \$43 million is included to benefit salmon, smelt and wildlife refuges. (*Details on fish and wildlife provisions and long-term infrastructure below.*)

The short-term, five-year operational provisions will ensure the system is operated using science, not intuition. They will help operate the water system more efficiently, pumping water when fish are not nearby and reducing pumping when they are close.

The vast majority of the bill has been public for months or years as part of previous versions and has been the subject of public hearings in May 2016 and October 2015. While there have been some changes to achieve broad agreement by all parties, the bill is largely similar to the bill I introduced in February.

We have also worked with a wide range of federal and state agencies to ensure this bill can be implemented in a way that remains within the bounds of the *Endangered Species Act* and biological opinions.

We must continue to press forward as the rainy season begins so we can begin to relieve serious water shortages in significant parts of the state.”

Summary of legislation

A summary of the bill follows:

- **Overview:** California’s water infrastructure is largely unchanged since the 1960s, when California was home to 16 million people. Our state—with a population of 40 million and the 6th largest economy in the world—relies on water infrastructure that is stretched to the breaking point and desperately needs to be improved and changed.
- **Environmental protections:** We worked with experts from federal and state agencies to draft an environmental protection mandate and a strong, comprehensive savings clause that makes clear the legislation must be implemented consistent with the *Endangered Species Act* and relevant biological opinions.
- **Long-term provisions:** This bill includes \$558 million in long-term funding authorizations. Paired with state and local funding, many of the 137 projects identified by the Feinstein drought bill introduced in February (S. 2533) will be within reach. Those projects could produce upwards of 1.4 million acre feet of water, enough for 2.8 million households. (*See additional details below.*)
- **Short-term provisions:** The bill also includes short-term provisions to ensure the system is operated using science, not intuition. This will help operate the water system more efficiently, pumping water when fish are not nearby and reducing pumping when they are close.
- **Duration:** The short-term operations will last for five years. Long-term construction projects still underway at the end of five years will continue to receive federal funding. One provision that expires after 10 years provides additional opportunities to environmental groups and water districts to consult on any future biological opinions.
- **Federal and State input:** The bill was reviewed extensively by federal and state agencies to ensure it is consistent with environmental laws, including the *Endangered Species Act* and biological opinions.

Environmental protections

- Most importantly, **the bill includes a strong, comprehensive savings clause**. This clause is included at the end of this press release.
 - Drafted by Department of the Interior and the Commerce Department, **the savings clause prohibits any federal agency from taking any action that would violate any environmental laws, including the *Endangered Species Act* and biological opinions.**
 - The savings clause is stronger than the clause included in Feinstein’s February 2016 drought bill, containing additional language to make clear **nothing in the bill overrides or amends any obligations to manage coastal fisheries** off the coasts of California, Oregon and Washington.
 - Includes an **environmental protection mandate** drafted by NOAA Fisheries to ensure full consistency with the *Endangered Species Act*.
 - Includes language at the request of the administration that protects agencies’ abilities to develop **successor biological opinions**.
- **The long-term authorizations include \$43 million to benefit endangered fish and wildlife**, including:

- **\$15 million for the protection and restoration of salmon:** These funds will be used to increase spawning habitat on the Sacramento River and purchase water to increase flows to reducing predation at Clifton Court Forebay. **These funds can also be used to fix the broken cold water valve at Shasta to prevent 98 percent mortality rates from happening again.** These devices must be fixed and functioning so that we can avoid what we saw in 2015, when 98 percent of the salmon year class died, and in 2014 when 95 percent of the salmon year class died.
- **\$15 million for fish passage projects:** Reauthorizes at \$15 million the *Fisheries Restoration and Irrigation Mitigation Act* (which expired in 2015), a voluntary, cost-sharing program the U.S. Fish and Wildlife Service uses to pay for installing fish screens and diversions that protect migrating salmon.
- **\$3 million for a Delta Smelt Distribution Study:** The better the fish is understood, the better we can operate the system and protect this endangered species. The Fish and Wildlife Service recommended this provision.
- **A program to reduce predation:** The bill directs agencies to address the threat to smelt and salmon by reducing the threat of predators. The regional administrator for NOAA Fisheries (who oversees salmon in California) has stated that predation in the Delta is “unequivocally” a problem.
- **A program to purchase additional water:** The bill authorizes the federal government to purchase water from willing sellers to augment flows needed for fish. Currently there is limited workable authority to accomplish this. The Department of the Interior requested this authority to enable targeted water purchases to provide more water for fish in conjunction with measures to improve habitat and food supply, which will help restore fish populations.
- **Programs to reduce invasive species that harm fish:** The bill authorizes pilot projects under a CALFED program to control invasive species. Invasive species—such as water hyacinth and Asian clams—have contributed to the decline of native listed fish in the Bay-Delta, including the Delta smelt.
- **\$10 million for wildlife refuges:** This will allow refuges to connect to additional sources of water supply, for example through channels.
- **The bill has a comprehensive environmental protection mandate** drafted by NOAA Fisheries and the Department of the Interior to ensure that the actions under this bill fully reflect the protections of the *Endangered Species Act*.
- **Consistency with state law:** All provisions in the bill must be consistent with state law including water quality and salinity control standards.
- **Coastal salmon fisheries:** The bill protects agencies’ authority to manage salmon and other fisheries off the coast of California, Oregon and Washington under the *Magnuson Stevens Act* or the *Endangered Species Act*.
- **Environmental and water district input into *Endangered Species Act* consultation:** The bill increases transparency and public input during any *Endangered Species Act* consultations by providing environmental groups and water districts with the opportunity to work with the agencies on any future biological opinions. The provisions also provide for quarterly stakeholder meetings so the public is kept informed of any *Endangered Species Act* consultations. Nothing in this section affects in any way the substantive requirements of consultation under the *Endangered Species Act* to protect species.

Long-term water infrastructure provisions

- **Authorization of projects:** \$515 million, fully offset, goes to storage, recycling, reuse and desalination projects. These funds will help supplement California’s water bond.

- **Funds:** The bill authorizes the following funds:
 - **Desalination:** \$30 million for design and construction of desalination projects.
 - **Water recycling, reuse and conservation:** Increases funding for WaterSMART by \$100 million (from \$350 million to \$450 million), including \$50 million for water supply and conservation activities on the Colorado River. Includes another \$50 million for water recycling through a new Title XVI grant program that actually works for new water recycling projects, unlike the current program. The revised program will allow new water recycling projects to get federal funding even if Congress has not authorized each specific project.
 - **Storage:** \$335 million in funding for storage and groundwater projects.
- **Coordinated implementation with the state water bond:** This will allow federal funding to go to qualified, environmentally-mitigated and cost-beneficial projects such as desalination, recycling, groundwater and storage projects on the same timeframe as projects funded under the state water bond.

Short-term operational provisions

- Duration: The short-term operational provisions expire after five years. Researchers from UCLA have reported that it will take approximately four and a half years for a full recovery from the drought.
- Eight key provisions will allow more water to be captured and stored.
 - 1) **Daily monitoring for fish** closer to the pumps will allow pumps to be operated at higher levels while better protecting fish. This daily boat monitoring for smelt will occur when water turbidity levels are high (cloudy water attracts fish to pumps), which will allow pumping decisions to be made based the actual location of the fish.
 - 2) **Ending the winter storm “payback” requirement** will allow agencies to capture additional water during winter storms. Agencies may increase pumping during winter storms so long as they do not violate the environmental protection mandate. Once storms end, agencies would no longer be required to “pay back” water already pumped unless there was an environmental reason to do so.
 - 3) **Requires agencies to explain why pumping occurs at lower levels than allowed by the biological opinions.** The requirement is about transparency: agencies must provide reasons for why pumping was reduced.
 - 4) **Agencies must maximize water supplies consistent with applicable laws and biological opinions.** The bill also makes very clear that agencies can take no action that would violate the *Endangered Species Act* or biological opinions.
 - 5) **Pilot Project to open Delta Cross-Channel Gates in a manner that achieves increased water supply without any harm to fish.** The agencies would evaluate alternative ways to open the gates and protect fish during their migration. If the pilot project is successful, it would yield extra water with no harm to the fish or water quality.
 - 6) **Extending the time period for water transfers by five months.** The current transfer window of July through September is extended to April through November. This makes water available during the critical spring planting season.
 - 7) **Allowing a 1:1 ratio for water transfers.** The provision provides a strong incentive for water transfers during critical salmon migratory periods in April and May in the lower San Joaquin. Through transfers, the same unit of water can therefore help both fish and farms. This provision helps facilitate voluntary transfers in April and May by allowing a 1:1 inflow to export ratio solely for water transfers. Buyers and sellers have little incentive to transfer water unless they receive the full value of their water—the 1:1 ratio.

The bill includes strong environmental protections to ensure this water is in addition to the regular flow of the river, extra water that will benefit fish.

- 8) **Allowing expedited reviews of transfers and the construction of barriers.** To expedite environmental reviews of proposed water transfers, agencies are directed to finish their reviews within 45 days of receiving complete applications for the transfers. The approval of temporary salinity barriers must be completed within 60 days. If environmental impact statements must be prepared under NEPA, the agencies can take longer than the generally applicable deadlines.

Outreach process

Over the course of two years, Senator Feinstein and her staff took hundreds of meetings, phone calls and discussions. Feedback was accepted from Republicans and Democrats and Senator Feinstein made dozens of changes to the bill text in response to comments from environmental groups, water districts, cities, rural communities, fishermen and farmers.

The bill was also reviewed by experts with federal and state agencies to ensure it would remain within the bounds of the *Endangered Species Act* and relevant biological opinions.

A previous version of the bill introduced in February 2016 (S. 2533) received support from 151 organizations and public officials from across California.

Savings clause

Following is the bill's savings clause that prevents the legislation from violating state or federal environmental laws including the *Endangered Species Act* and biological opinions. ***Bracketed text is where each part of the clause originated.***

Sec. 4012. SAVINGS LANGUAGE.

- (a) IN GENERAL.—This Act shall not be interpreted or implemented in a manner that—
- (1) preempts or modifies any obligation of the United States to act in conformance with applicable State law, including applicable State water law; ***[requested by Governor Brown's office; also included in February 2016 Feinstein drought bill]***
 - (2) affects or modifies any obligation under the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4706), except for the savings provisions for the Stanislaus River predator management program expressly established by section 12(b); ***[included in February 2016 Feinstein drought bill]***
 - (3) overrides, modifies, or amends the applicability of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or the application of the smelt and salmonid biological opinions to the operation of the Central Valley Project or the State Water Project; ***[drafted by NOAA Fisheries and the Department of the Interior; also included in February 2016 Feinstein drought bill]***
 - (4) would cause additional adverse effects on listed fish species beyond the range of effects anticipated to occur to the listed fish species for the duration of the applicable biological opinion, using the best scientific and commercial data available; ***[drafted by NOAA Fisheries and the Department of the Interior]*** or
 - (5) overrides, modifies, or amends any obligation of the Pacific Fisheries Management Council, required by the Magnuson Stevens Act or the Endangered Species Act, to manage fisheries off the coast of California, Oregon, or Washington. ***[requested by Senator Wyden]***
- (b) SUCCESSOR BIOLOGICAL OPINIONS. —
- (1) IN GENERAL. —The Secretaries of the Interior and Commerce shall apply this Act to any successor biological opinions to the smelt or salmonid biological opinions only to the extent that the Secretaries determine is consistent with:

(A) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), its implementing regulations, and the successor biological opinions; and

(B) Subsection (a)(4) above. *[requested by administration]*

(2) LIMITATION.—Nothing in this Act shall restrict the Secretaries of the Interior and Commerce from completing consultation on successor biological opinions and through those successor biological opinions implementing whatever adjustments in operations or other activities as may be required by the Endangered Species Act and its implementing regulations. *[requested by administration]*

(c) SEVERABILITY.—If any provision of this Act, or any application of such provision to any person or circumstance, is held to be inconsistent with any law or the biological opinions, the remainder of this Act and the application of this Act to any other person or circumstance shall not be affected. *[included in February 2016 Feinstein drought bill]*

###

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From: DCardoza@foley.com
Sent: Monday, December 5, 2016 3:00 PM
To: 'Birmingham Tom'; 'Johnny Amaral'; David Longly Bernhardt (dbernhardt@bhfs.com); drehberg@mercuryllc.com
Subject: FW: House Democrat Veto Request
Attachments: WRDA Veto Request.pdf

FYI Not many on this letter. Dennis

From: Thomas Jr, John B.
Sent: Monday, December 05, 2016 4:48 PM
To: Cardoza, Dennis A.
Subject: House Democrat Veto Request

Dennis,

Attached is a letter from a dozen House Democrats requesting a veto threat from the Obama Administration for the proposed California drought relief legislation.

John

John B. Thomas Jr
Public Affairs Advisor

Foley & Lardner LLP
3000 K Street, N.W. | Suite 600
Washington, DC 20007-5109
P 202.295.4442

[Visit Foley.com](http://foley.com)



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Congress of the United States
Washington, DC 20515

Ms. Christy Goldfuss
Managing Director
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20506

December 2, 2016

Dear Director Goldfuss,

We write in strong opposition to the attached proposal that would override existing regulations to expedite and increase the shipment of water from the Sacramento San Joaquin Delta (Delta) to South-of-Delta water users.

The proposal undermines both state and federal environmental protections for the Delta ecosystem and impedes local agencies and water experts from determining how best to manage our state's strained water resources. The legislation does not reflect an agreement among all stakeholders, members of the California delegation, or the impacted communities of the entire West Coast. Instead, this measure serves as yet another attempt to export more water to corporate agriculture interests south of the Delta at the expense of Northern California's farmers, the Delta ecosystem, families, and fishing communities across the West Coast.

The challenges facing California's water system will not be solved through operational changes to divert more water through the Delta pumps. Instead, these measures provide a short-sighted approach that jeopardizes water quality for Northern California users with no clear evidence of improved deliveries for Central Valley Project contractors.

The State of California has strongly opposed similar efforts in previous versions of this legislation. Governor Brown has stated that these harmful proposals would "undermine California's own ability to address serious water challenges." The state rejected "such unwelcome and divisive intrusion into California's efforts to manage this severe crisis. It would override state laws and protections, and mandate that certain water interests come out ahead of others."

Western water supply issues stem from conditions like diminished snowpack, groundwater overdraft, and high utilization. Insufficient contract allocations come from a lack of water, not environmental protections. Instead of bleeding the state's existing resources dry, we must look to new and innovative ways to maximize supplies like water reuse and recycling, or desalination. We do not believe that this proposal offers substantive relief to the communities we represent nor does it reflect the work accomplished by state and federal agencies to address drought conditions in the West.


We appreciate this Administration's efforts thus far to balance needs across regions and users. President Obama has threatened to veto substantially similar measures, finding that such bills

would "not provide additional meaningful relief to those most affected by the drought. It will, however, negatively impact our ability to protect Delta fish and wildlife in the long-term; particularly those species listed under Federal and State endangered species laws." As you review this latest proposal, we urge you again to consider all communities throughout California and the Pacific Northwest who rely on these natural resources.

The outcome of this Presidential election has charted a precarious course for our ecosystems' most important protections. The legacy of this Administration should be defined by actions taken to preserve and defend our environment, we urge you to oppose the reversal of decades of environmental achievements protecting communities dependent upon thriving forests, fisheries, and estuaries for their livelihoods and recreational enjoyment.

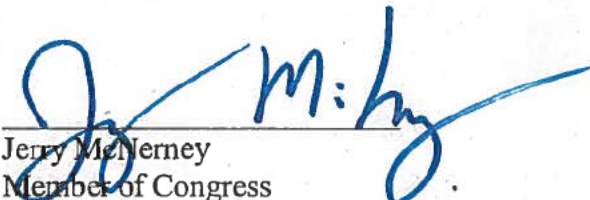
Thank you for your consideration of this urgent request. Please contact our offices should you need further information.

Sincerely,


Jared Huffman
Member of Congress



Mike Thompson
Member of Congress

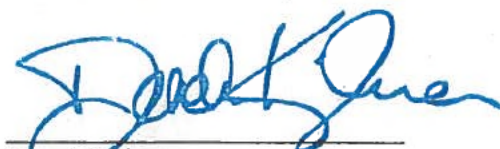

Doris Matsui
Member of Congress


Jerry McNerney
Member of Congress


Mark DeSaulnier
Member of Congress


Michael M. Honda
Member of Congress


Anna G. Eshoo
Member of Congress

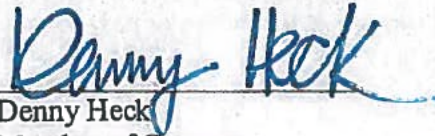

Derek Kilmer
Member of Congress



Sam Farr
Member of Congress



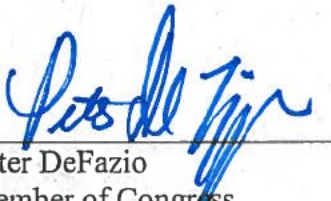
Suzan K. DeBene
Member of Congress



Denny Heck
Member of Congress



Suzanne Bonamici
Member of Congress



Peter DeFazio
Member of Congress

From: Julie Reynolds
Sent: Monday, December 5, 2016 7:35 PM
To: Karen Clark (kclark@westlandswater.org)
Subject: FW: Strategy Session in January

All of the dates you mention below work for Mike Burns. Thanks!

From: Michael Burns
Sent: Monday, December 05, 2016 10:33 AM
To: Julie Reynolds
Subject: FW: Strategy Session in January

From: Karen Clark
Sent: Monday, December 05, 2016 10:33:27 AM (UTC-08:00) Pacific Time (US & Canada)
To: Alison MacLeod; Carmela McHenry; Carolyn Jensen; Catherine Karen; Dan Pope; 'David Bernhardt'; Dennis Cardoza; Denny Rehberg; Ed Manning; 'Gayle Holman'; Jennifer Walsh; Johnny Amaral; Michael Burns; Sheila Greene; Shelley Ostrowski
Cc: Karen Clark
Subject: Strategy Session in January

All,

I am in the process of scheduling an all day PR/Legislation Strategy Session in January to be held in Sacramento at KP Communications.

Please email me your availability for the following dates:

January 18

January 24

January 25

January 26

January 30

January 31

February 1

Thanks!

~Karen

Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) 559.230.9470
(f) 559.241.6277

Email: kclark@westlandswater.org

From: DCardoza@foley.com

Sent: Tuesday, December 6, 2016 4:49 AM

To: tbirmingham@westlandswater.org; Amaral Johnny; Peltier Jason; Bernhardt David Longly; Karen Catherine; Rehberg Denny; sostrowski@westlandswater.org; JThomas@foley.com; JWalsh@foley.com

Subject: Lead story today in Senate CQ

Importance: Low

Water, Water Everywhere
By Niels Lesniewski, CQ Roll Call

California's two Democratic senators have long had a disagreement about how to address the water crisis in their state's Central Valley.

But like so many other issues, it just might come to a conclusion during this expected last week of Senate business for 2016.

House Majority Leader Kevin McCarthy<<http://www.cq.com/person/25162>>, R-Calif., recognized the efforts of Democratic Sen. Dianne Feinstein<<http://www.cq.com/person/80>> in coming to an agreement on the expected legislative vehicle for a water resources infrastructure bill (S 612<<http://www.cq.com/bill/114/S612>>). He said the deal would make more water available to communities that need it.

"Getting to this point has not been easy, but the collective commitment to provide relief to our state and local communities has proved resilient," McCarthy said. "This is an important moment for California, and the timing of this deal is critical — we cannot afford to miss capturing water from storms during this wet season."

[Story Photo]

Boxer (Bill Clark/CQ Roll Call)

Sen. Barbara Boxer<<http://www.cq.com/person/81>>, the ranking Democrat on the Environment and Public Works Committee that has jurisdiction over water resources development, was certainly not part of the deal. She said the changes have motivated her to try to block the bill when it arrives.

"This bill won't go anywhere in the Senate if I have anything to do with it, because it will result in the loss of thousands of fishery jobs, it will roll back the Endangered Species Act which was signed by President Nixon, and it will also take away power from Congress to approve new dams all over the country. The bill also fails to include strong Buy America requirements," Boxer said. "I will use every tool at my disposal to stop this last minute poison pill rider."

The bill is set for House floor consideration later this week as an amendment to an unrelated Senate bill, with Senate action expected to follow, assuming Boxer cannot rally the votes to block it.

During Tuesday's session, Sen. Dan Coats<<http://www.cq.com/person/721>>, R-Ind., will be honored in the Senate, with Majority Leader Mitch McConnell<<http://www.cq.com/person/202>> expected to make remarks before Coats gives what will actually be his second farewell to the chamber. Coats returned in 2011 after retiring once before (serving as ambassador to Germany and working in the private sector in between Senate stints).

Coats has been reported to be under consideration by President-elect Donald Trump for the director of national intelligence position.

After voting to limit debate Monday evening on the 21st Century Cures bill (HR 34<<http://www.cq.com/bill/114/HR34>>), the Senate will resume consideration of the health bill at 10 a.m.

from my iPhone

Please excuse any auto correct errors

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the benefit of the Foley & Lardner LLP client(s) represented by the Firm in the particular matter that is the subject of this message, and may not be relied upon by any other party.

From: Johnny Amaral
Sent: Tuesday, December 6, 2016 7:32 AM
To: Thomas Birmingham; David L. Bernhardt
Subject: FYI

My flight out of Fresno is delayed due to excessive fog. They just boarded us and claim we're departing in 10 minutes.

I'm going to have to sprint to catch my connection in Salt lake. Which ought to provide a few laughs for other travelers watching my fat ass rumble through the airport.

But, I hope to make it. I will let you know as soon as I get onto a connecting flight.

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

From: Rojewski, Cole
Sent: Tuesday, December 6, 2016 9:27 AM
To: Bernhardt, David L. (DBernhardt@BHFS.com); tbirmingham@westlandswater.org
CC: Dunklin, Kristina
Subject: FW: First Word Alert: Senate Democrats May Have Votes Against Water

fyi

From: Bloomberg Government [mailto:alerts@bgov.com]
Sent: Tuesday, December 06, 2016 11:24 AM
To: Rojewski, Cole
Subject: First Word Alert: Senate Democrats May Have Votes Against Water Bill: Durbin

Bloomberg GOVERNMENT

Senate Democrats May Have Votes Against Water Bill: Durbin

December 6, 2016 11:16AM ET | Bloomberg First Word

(Bloomberg) -- Democrats may have votes to sustain filibuster against water resources bill because of Sen. [Barbara Boxer](#)'s objection to the Calif. drought bill, Senate Democratic Whip [Dick Durbin](#) tells reporters.

- Drought provision of water projects bill, negotiated by McCarthy and Feinstein, "is very controversial within our caucus"
- Democrats "probably" have votes to block cloture
- "I haven't whipped it, but there's pretty strong sentiment opposed to, and I would say probably we do"
- Related: [Boxer to Use 'Every Tool' to Fight Drought Measure on Water Bill](#)

To contact the reporter on this story: Holly Rosenkrantz in Washington at hrosenkrantz@bloomberg.net To contact the editor responsible for this story: Derek Wallbank at dwallbank@bloomberg.net

News Alert

BGOV Congress Tracker

Relevance: HIGH

Topics And: BGOV Congress Tracker

Which sources do you want?: All

Published At:

[Edit this alert](#)



From: Sheila Greene
Sent: Tuesday, December 6, 2016 11:03 AM
To: 'Karen Clark'
Subject: RE: Strategy Session in January

I am available any of those dates. Thanks

From: Karen Clark [mailto:kclark@westlandswater.org]
Sent: Monday, December 5, 2016 10:33 AM
To: 'Alison MacLeod' <amacleod@ka-pow.com>; 'Carmela McHenry' <cmchenry@ka-pow.com>; 'Carolyn Jensen' <cjensen@ka-pow.com>; Catherine Karen <ckaren@sidley.com>; Dan Pope <dpope@westlandswater.org>; 'David Bernhardt' <dbernhardt@BHFS.com>; Dennis Cardoza <dcardoza@foley.com>; Denny Rehberg <drehberg@mercuryllc.com>; 'Ed Manning' <emanning@ka-pow.com>; 'Gayle Holman' <gholman@westlandswater.org>; Jennifer Walsh <jwalsh@foley.com>; Johnny Amaral <jamaral@westlandswater.org>; 'Mike Burns' <mburns@ka-pow.com>; Sheila Greene <sgreene@westlandswater.org>; Shelley Ostrowski <sostrowski@westlandswater.org>
Cc: Karen Clark <kclark@westlandswater.org>
Subject: Strategy Session in January

All,

I am in the process of scheduling an all day PR/Legislation Strategy Session in January to be held in Sacramento at KP Communications.

Please email me your availability for the following dates:

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January 31

February 1

Thanks!

~Karen

Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) 559.230.9470
(f) 559.241.6277
Email: kclark@westlandswater.org

From: DCardoza@foley.com

Sent: Tuesday, December 6, 2016 1:15 PM

To: Birmingham Tom; Bernhardt David Longly; Amaral Johnny; Rehberg Denny; Karen Catherine; Peltier Jason; Ostrowski Michelle; RSmith@BHFS.com; JThomas@foley.com

Subject: Fwd: NRECA Supports WIIN Conference Agreement

Attachments: image001.emz; ATT00001.htm; NRECA Supports Final WIIN Act (2).pdf; ATT00002.htm

Sent from my iPhone

Please excuse any auto correct errors

Begin forwarded message:

From: "Petersen, Scott" <Scott.Petersen@mail.house.gov<<mailto:Scott.Petersen@mail.house.gov>>>
To: "Costa, Jim" <[REDACTED]@[REDACTED]><[mailto:\[REDACTED\]@\[REDACTED\]](mailto:[REDACTED]@[REDACTED])>> "Cardoza, Dennis A." <DCardoza@foley.com<<mailto:DCardoza@foley.com>>>
Cc: "Walsh, Jennifer F." <JWalsh@foley.com<<mailto:JWalsh@foley.com>>>
Subject: FW: NRECA Supports WIIN Conference Agreement

FYI

J. Scott Petersen, P.E.
Deputy Chief of Staff
Rep. Jim Costa (CA-16)

From: NRECALegAlert [<mailto:NRECALegAlert@nreca.org>]
Sent: Tuesday, December 06, 2016 2:58 PM
Subject: NRECA Supports WIIN Conference Agreement

Good afternoon,

The National Rural Electric Cooperative Association (NRECA), whose member utilities serve 42 million Americans in 47 states across 75 percent of the country's land mass, urges your Representative to support the bipartisan conference agreement on S.612, the Water Infrastructure Improvements for the Nation Act (WIIN).

The final WIIN conference agreement helps electric cooperatives to continue to provide affordable, reliable electricity to rural America by authorizing and promoting infrastructure projects for hydropower, flood control, water supply and emergency management. Additionally, it includes Section 2301, among other provisions, that provide greater certainty for electric generation and will help maintain affordable electric rates for rural consumers.

Attached is the Dec. 5th letter our organization sent to Members of House and Senate Leadership.

It is our hope Congress will promptly pass the bipartisan WIIN agreement in the remaining days of the 114th Congress.
[cid:image004.png@01D24FD1.54F5A6B0]

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December 5, 2016

The Honorable Mitch McConnell
Senate Majority Leader
United States Senate

The Honorable Harry Reid
Senate Minority Leader
United States Senate

The Honorable Paul Ryan
House Speaker
United States House of Representatives

The Honorable Nancy Pelosi
House Minority Leader
United States House of Representatives

Dear Majority Leader McConnell, Minority Leader Reid, Speaker Ryan and Minority Leader Pelosi:

The National Rural Electric Cooperative Association (NRECA) represents consumer-owned, not-for-profit electric cooperatives governed by their member owners. Electric cooperatives serve 42 million Americans in 47 states across 75 percent of the country's land mass. On behalf of America's electric cooperatives, NRECA applauds the hard work of Congress to develop a bipartisan conference agreement on S.612, the Water Infrastructure Improvements for the Nation Act (WIIN Act).

The final WIIN Act helps electric cooperatives to continue to provide affordable, reliable electricity to rural America by authorizing and promoting infrastructure projects pertaining to hydropower, flood control, water supply and emergency management. Additionally, the final agreement includes provisions that will provide greater certainty for electric generation and help maintain affordable electric rates that benefit rural consumers.

Thanks again for your hard work and dedication to crafting a bipartisan WIIN reauthorization that will strengthen rural America. Electric cooperatives urge Congress to promptly pass WIIN in the remaining days of the 114th Congress.

Sincerely,

Jim Matheson
CEO, NRECA

From: DCardoza@foley.com

Sent: Wednesday, December 7, 2016 10:26 AM

To: Birmingham Tom; Amaral Johnny; Peltier Jason; Bernhardt David Longly; Rehberg Denny; Ostrowski Michelle; Karen Catherine

Subject: Fwd: Here's what's happening today in California water, 12/07/2016 #cawater

Lots worth reading in this issue of Maven!

Sent from my iPhone

Please excuse any auto correct errors

Begin forwarded message:

From: Maven <maven@mavensnotebook.com<<mailto:maven@mavensnotebook.com>>>

Date: December 7, 2016 at 12:03:26 PM EST

To: <Dcardoza@foley.com<<mailto:Dcardoza@foley.com>>>

Subject: Here's what's happening today in California water, 12/07/2016 #cawater

Reply-To: Maven <maven@mavensnotebook.com<<mailto:maven@mavensnotebook.com>>>

The latest in California water news and information Is this email not displaying correctly?

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DAILY DIGEST: White House won't support California water bill; The Delta's dirty little secret; CA water savings 19.5% in October; Two top CA Department of Water Resources officials to retire at the end of the year; and more ...

Dec 07, 2016 08:45 am | Maven

[Survey map Daily Digest sliderbox]In California water news today, White House won't support California water bill that's already divided its senators; Lois Henry: One more try for federal fixes to California's water woes; The Sacramento Delta's dirty little secret; Work continues to restore link between San Joaquin River and the Pacific Ocean; Speakers say river-flow plan should be revised; California water savings 19.5% in ...

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BAY DELTA SCIENCE CONFERENCE: Dr. Peter Moyle on academic research, Delta smelt, and public policy: a personal history

Dec 07, 2016 06:45 am | Maven

[moyle-plenary-_page_21]Protection of the Bay-Delta ecosystem is at a pivotal point. The system has endured devastating drought cycles and often competing priorities that seek to supply water for both cities and farms as well as improve the aquatic ecosystem for fisheries, recreation and tourism. Achieving these co-equal goals requires science that expands our knowledge of ecosystem responses, produces data that directly ...

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NEWS WORTH NOTING: Statewide water savings exceed 19% in October; Delta Protection Commission releases draft levee funding feasibility study; Film on future of California water debuts at statewide forum
Dec 07, 2016 06:35 am | Maven

[News worth noting Sliderbox schematic]Statewide Water Savings Exceed 19 Percent in October; Most of State Still Experiencing Drought Conditions From the State Water Resources Control Board: The State Water Resources Control Board today announced that urban Californians' monthly water conservation was 19.5 percent in October, up from 18.3 percent in September and a bit below the 22.3 percent savings in October 2015, when state-mandated ...

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METROPOLITAN SPECIAL COMMITTEE ON BAY-DELTA: Status on California Water Fix cost allocation discussions<<http://MavensNotebook.us7.list-manage1.com/track/click?u=88af2b23c65f1c863838dd9a5&id=a64c4692ab&e=aa768fe7a0>>

BLOG ROUND-UP: California's internecine water war; the Bay Delta and the ESA; Drought as a weapon of mass destruction; About that 40%; and more ...<<http://MavensNotebook.us7.list-manage.com/track/click?u=88af2b23c65f1c863838dd9a5&id=9026d0d787&e=aa768fe7a0>>

NEWS WORTH NOTING: State Water Board approves Prop 1 stormwater implementation grants; SGMA Implementation: Submitting alternatives to Groundwater Sustainability Plans; Boxer to introduce bill protecting water of tribes and municipalities<<http://MavensNotebook.us7.list-manage.com/track/click?u=88af2b23c65f1c863838dd9a5&id=db6382874f&e=aa768fe7a0>>

THIS JUST IN ... Costa applauds WRDA bill; Huffman slams the effort; Boxer blasts the GOP push; and NRDC says safe drinking water for Flint shouldn't be at expense of CA jobs or environment<<http://MavensNotebook.us7.list-manage1.com/track/click?u=88af2b23c65f1c863838dd9a5&id=584db45955&e=aa768fe7a0>>
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From: Dennis Nuxoll
Sent: Wednesday, December 7, 2016 1:54 PM
To: David Longly Bernhardt; Johnny Amaral
Subject: Fwd: Stabenow whipping in support

Fyi

Sent from my iPhone

Begin forwarded message:

From: <dnuxoll@WGA.COM<<mailto:dnuxoll@WGA.COM>>>
Date: December 7, 2016 at 12:39:34 PM PST
To: Jennifer Duck <J_Duck@feinstein.senate.gov<mailto:J_Duck@feinstein.senate.gov>>
Cc: john watts <John_Watts@feinstein.senate.gov<mailto:John_Watts@feinstein.senate.gov>>
Subject: Stabenow whipping in support

I assume you guys are talking to her team, but as FYI I'm sending over talking points that stabenow can use to articulate why water language is important for CA ag.

- Dennis

Sent from my iPhone

From: Bernhardt, David L.

Sent: Friday, December 9, 2016 5:17 AM

To: Johnny Amaral

Subject: Fwd: Morning Energy, presented by Vet Voice Foundation: Water infrastructure, spending bills delayed in Senate — Imagining Pruitt's EPA — Rob Bishop's busy to-do list for 2017

David Bernhardt

Begin forwarded message:

From: POLITICO Pro Energy <politicoemail@politicopro.com>

Date: December 9, 2016 at 5:47:57 AM EST

To: <dbernhardt@BHFS.com>

Subject: Morning Energy, presented by Vet Voice Foundation: Water infrastructure, spending bills delayed in Senate — Imagining Pruitt's EPA — Rob Bishop's busy to-do list for 2017

Reply-To: POLITICO subscriptions <reply-fe8a1271716d027576-630326_HTML-637932022-1376319-0@politicoemail.com>

By Anthony Adragna | 12/09/2016 05:45 AM EDT

With help from Nick Juliano, Elana Schor, Alex Guillén and Annie Snider

MINERS' BENEFITS PUSH SENATE INTO OVERTIME: Senate Democrats keep threatening to delay final votes on water infrastructure legislation and a short-term government funding bill unless Republicans meet their demands for an extension of expiring benefits for coal miners. But the leaders of that cause — Sens. [Joe Manchin](#) of West Virginia and [Sherrod Brown](#) of Ohio — have precious little leverage after the House took its final votes Thursday and Senate Majority Leader [Mitch McConnell](#) set in motion votes to pass the bills. And that's not all: Democrats are also trying to amend the House-passed Water Infrastructure Improvements for the Nation Act (S. 612) to include permanent "Buy America" language.

"We are all in the same place on mine workers and all in the same place on the [water infrastructure] provision on Buy America," Brown told reporters Thursday night, referring to the Democratic caucus. But senior Republicans said earlier in the day that the time for negotiations had passed, and there wouldn't be any changes to the miners' benefits in the government funding bill: "I think that ship has sailed," Senate Majority Whip [John Cornyn](#) said. Senate Democrats could hold up final passage of the CR until Sunday using procedural tactics, though the government shuts down at 12:01 a.m. on Saturday.

White House spokesman Josh Earnest was sympathetic to Senate Democrats' efforts on the miners issue, but stopped well short of a veto threat Thursday, saying "we'll have to see whether or not that's something that Republicans in Congress can fix before they send the bill to the White House." And he offered Democrats little cover for holding up the water measure, making no mention of the California water wars and instead holding Republicans' feet to the fire not to leave town without "fulfilling their promise to the people of Flint" — a promise hinging on language in both the CR and the WRDA bill. ICYMI: Both measures passed the House on strong votes Wednesday, with only 63 Democrats ultimately defecting from the WRDA bill.

Kildee urges passage for Flint: While acknowledging the underlying legislation is imperfect, Michigan Rep. [Dan Kildee](#) urged his Senate Democratic colleagues to pass the bills so that the beleaguered city of Flint, Mich. could finally get funding to address its lead-tainted drinking water. "Obviously, there are parts of this legislation we don't like," he told reporters after the House vote. "[But] we can act in a way — voting on imperfect legislation — that says the people of Flint really matter." POLITICO's Burgess Everett, Seung Min Kim and Ben Weyl have the latest on the situation in the Senate [here](#).

IT'S FRIDAY! THANK GOODNESS! I'm your host Anthony Adragna, and the House science panel's Richard Yamada was the first to identify former Montana Sen. Mike Mansfield as the longest-serving party leader in history. Your end-of-the-week trivia: What was the most recent position to lose Cabinet-level status? Send your tips, energy gossip and comments to aadragna@politico.com, or follow us on Twitter [@AnthonyAdragna](#), [@Morning_Energy](#), and [@POLITICOPro](#).

ENVISIONING PRUITT'S EPA: President Barack Obama relied heavily on his executive power and the EPA to help implement his climate change policies, but bypassing Congress means President-elect Donald Trump and his pick to run the EPA, Oklahoma Attorney General Scott Pruitt, can use the same type of executive action to turn back the clock on his environmental legacy, Pro's Andrew Restuccia and Alex Guillén [report](#). "It's the end of the EPA's climate agenda," conceded David Bookbinder, the Sierra Club's former chief climate counsel. "The Clean Power Plan is dead. Let's just forget it."

Other efforts to undermine: While the entirety of Pruitt's agenda is unclear, he could also chip away at the agency's efforts to slash carbon pollution from oil and gas operations, airplanes, cars and trucks. That fact leaves current and former Obama administration officials fearful that years of their work will be undone by the Pruitt EPA. "All the things that I've done in my life that I feel most professionally proud of are going to be blown up in one shape or form," one former senior administration official said.

WHITMAN TO PRUITT: GIVE EPA A CHANCE: ME caught up with the last Republican EPA administrator to follow a Democratic president: Christine Todd Whitman, who led the agency from 2001 to 2003. Whitman — a Clean Power Plan supporter — has a very different approach to regulating compared to Pruitt, who is involved in a number of ongoing lawsuits against the agency and who she said shouldn't have "a knee-jerk reaction of 'It's got to be wrong if it came from the agency.'"

Does she have advice for Pruitt? "Not any he'd listen to," she quipped. Still, Whitman offered: "Take a little time to get to know how the agency is constituted and how it's set up and what its real responsibilities are." He should also "remember that what he's in charge of now is the place where we protect human health and the environment. That's a huge responsibility and you need to take it seriously."

RETHINKING MAJOR ENVIRONMENTAL LAWS: As he ponders priorities for the 2017 Congress, House Natural Resources Chairman [Rob Bishop](#) told ME Thursday he thought major environmental laws — including the Endangered Species Act, National Environmental Policy Act, the Antiquities Act and Clean Water Act — all needed fundamental rethinking. But he acknowledged actually revamping them would be a "hard lift to do."

On the Endangered Species Act, Bishop said the law's focus was not on rehabilitating threatened species but gaining control of lands. "It has nothing to do with the damn species. The entire thing needs to be rethought," the Utah Republican said. And he added that NEPA has

strayed from its original intent and now is used primarily as a way to obstruct infrastructure projects. "You can't just tweak that, you can't just pass an executive order. There's got to be a major rethought of the process," he said.

Tricky picking priorities: Before heading to his final votes of this Congress, Bishop said he was working on ranking his priorities for next year, though he noted a final order would have to wait until all the political appointees were in place. He plans to pursue his public lands initiative, forest fire resiliency efforts, a broadened sportsmen's package and major changes to the Land and Water Conservation Fund, among other things.

**** A message from Vet Voice Foundation:** Veterans and military families across the country consider it part of our patriotic duty to protect America's public lands. Together, we urge Congress to invest in and protect our public lands and parks as they would our roads, bridges and tunnels as they fulfill their promise to rebuild our American infrastructure.

www.VetVoiceFoundation.org **

DEMOCRATS AMPLIFY WAR ON PRUITT: Sen. [Ed Markey](#) told reporters Thursday that Democrats would make stopping Scott Pruitt's EPA nomination one of their top priorities, and they're predicting a stronger public outcry than has been seen in decades. "It will be showdown on every clean air, clean water, climate bill that has ever passed the House and Senate of the United States," Markey said. "It's a smorgasbord of bad Cabinet nominees that are being presented to the Senate, but again I would put the EPA right at the top of the list." He likened the selection of the Oklahoma attorney general to Ronald Reagan's picks of Anne Gorsuch Burford and Rita Lavelle for EPA, both of whom later resigned under pressure.

Fears over U.S. leadership: Installing Pruitt to lead EPA would weaken U.S. credibility internationally on a host of issues, Markey warned. "They will be saying that the United States is now preaching temperance from a bar stool," the Massachusetts Democrat said.

HEITKAMP NOT SOLD ON TRUMP EPA NOMINEE: Sen. [Heidi Heitkamp](#) (D-N.D.) met with Trump last week and remains in the running to join his Cabinet, but that doesn't mean she's prepared to fall in line as a yes. Pruitt is also a longtime critic of the federal ethanol mandate, which gives Heitkamp — who faces a tough reelection battle in 2018, if she stays in the Senate — some serious pause.

"I'm still learning about him, but I have serious concerns about his record of opposing the Renewable Fuel Standard, which is critical for farmers and jobs across North Dakota," Heitkamp said in a statement. "If we're going to have an EPA administrator who understands rural America, that means they also have to understand the needs of farmers and want to support those farmers."

But finding the votes to stop Pruitt looks tough: Sen. [Lindsey Graham](#), one of the few Republicans to acknowledge human activity is the primary driver of climate change, told reporters Thursday he was "inclined" to support Pruitt: "If I excluded everybody in the Republican Party that doesn't believe in climate change, I wouldn't have too many friends," he said. Democrats would need a handful of GOP defectors if they want to block of Pruitt's nomination.

Debatable: Rep. [Mike Quigley](#) invited Pruitt to debate the scientific basis of climate change in Chicago. "With science on my side, I invite [@AGScottPruitt](#) to Chicago to debate the existence of [#ClimateChange](#) & the reality of its man-made causes," he tweeted.

'GUERRILLA WARFARE' IS THE NEW REGULAR ORDER: Sens. [Lisa Murkowski](#) and [Maria Cantwell](#) grappled with what they see as the new way of legislating in a pair of floor speeches the pair delivered Thursday evening lamenting the death of their meticulously crafted energy bill as Congress prepares to end its year. Noting the two years of work they put in — starting with listening sessions, moving to hearings, then markups, then floor debate and finally a conference committee with the House — the senators were aghast that the bill collapsed inches away from the finish line as the House adjourned more than two weeks before Christmas. "We have done it by the book," Murkowski said, eliciting nods from the Senate pages when she noted the gulf between her and Cantwell's Schoolhouse Rock approach to legislating and what normally goes on in the Capitol. Perhaps, Murkowski added, this marks the end of "regular order" for good.

"I think what we were doing is extraordinary — it's not normal," Murkowski said, and instead, "guerilla warfare" is the way to get things done now. Cantwell, speaking just before Murkowski took the floor, complained that their broadly popular bill was left in the dustbin by House leadership, who took the "more outrageous" step of pushing through a water infrastructure bill into which they had "air dropped" a California drought provision at the very last minute.

WHO WILL GET DOE NOD? In the race for Energy secretary, it doesn't seem like Trump has finalized his pick, despite a flurry of reports. Today's Trump Tower meeting for Manchin, [who has been rumored for the job](#) since last week, has all the makings of an interview. Meanwhile, former Texas Gov. Rick Perry, who has been in the mix for some time and has made the pilgrimage to Trump's New York skyscraper, is now considered a leading candidate, as The Wall Street Journal [reports](#). And CBS [reports](#) that Ray Washburne, a member of Trump's finance team and a former finance director for Chris Christie, is "a top candidate" — but he's something of an unknown in D.C. policy circles. (He is, however, married to an heiress of the Hunt Oil fortune.) Rep. [Kevin Cramer](#) (R-N.D.), a Trump energy adviser, is also popular in the PE's inner circle but may be leaning toward staying in Congress (h/t POLITICO Transition).

THAT WAS FAST: Amid rumors that Rep. [Cathy McMorris Rodgers](#) will be named Interior secretary, a handful of House Republicans are quietly laying the groundwork to fill her current job of House GOP Conference chair, POLITICO's Rachael Bade and Kyle Cheney [report](#). Reps. [Mimi Walters](#) (R-Calif.), [Susan Brooks](#) (R-Ind.), [Mia Love](#) (R-Utah) and [Doug Collins](#) (R-Ga.) are exploring bids for the No. 4 position in House leadership .

LOCKED OUT: "The group of [Trump] loyalists who helped launch his campaign and powered its stunning early victories are growing worried they won't be getting plum jobs," POLITICO's Alex Isenstadt and Kenneth P. Vogel [report](#).

REID'S FAREWELL WARNING ON YUCCA: Many people believe the departure of Senate Minority Leader [Harry Reid](#) may allow the nuclear waste repository at Yucca Mountain to move forward, but the Nevada Democrat warned during his farewell address Thursday that it wouldn't be so easy. "They'd have to start all over again," Reid said. "You could probably get it going again now for \$10-12 billion. So if you have a way to pay for it, good luck."

'No problem' with coal: In between touting his efforts to expand renewable energy in Nevada and create new national parks, Reid asserted he had "no problem" with coal, while explaining his state's two remaining coal-fired plants would soon close. "I've helped fund clean coal technology," he said. "So I have nothing against coal."

LIGHTER CLICK: Trump's plan to revive the coal industry. [Cartoon](#).

MAIL CALL! ALASKA DELEGATION WARNS AGAINST DRILLING BAN:

Republican Alaskan Sens. Lisa Murkowski and Dan Sullivan, as well as Rep. Don Young, sent President Obama a [letter](#) Thursday urging him not to pursue a permanent ban on fossil fuel drilling in the Arctic during his final days in office. "We instead encourage you to work with us — and to listen to and respect the voices of the Alaskan people — to chart a course allowing responsible development to proceed," they wrote.

STAND STRONG, BOXER URGES: With employees wary of what their world may look like under the Trump administration, outgoing Environment and Public Works Committee top Democrat [Barbara Boxer](#) sent the employees of EPA [a letter](#) thanking them for their efforts. "You must continue your important work that is rooted in science and never be afraid to do so," she wrote. "Although I am retiring from the Senate, I plan to keep fighting these fights — I will just be doing it from California."

BEWARE THE MIGHTY OMB: High-level political appointees continue to be confounded by the OMB's enormous influence, [according to](#) outgoing Agriculture Secretary Tom Vilsack. "Early in the administration I would get quite a rise out of people when I would say to them, 'I never thought I would meet God on Earth, but OMB is about as close to that as possible,'" he told Pro Agriculture's Helena Bottemiller Evich in a lengthy interview. "I never realized there was a department that had that much clout with not much statutory authority, and very few people. But they do." (h/t Budget and Appropriations Brief)

TRIBAL GROUPS TESTIFY ON HUMAN RIGHTS: A group of tribal representatives, including some from the Standing Rock Sioux currently battling the Dakota Access pipeline, will testify at a hearing by the Inter-American Commission on Human Rights today in Washington. They [petitioned](#) the commission on Dec. 2 to protect their rights during the pipeline protests.

JEWELL IN NEW MEXICO: Interior Secretary Sally Jewell will hike today in the Organ Mountains-Desert Peaks National Monument in Las Cruces, N.M., and then discuss "the economic importance of protecting public lands and national monuments" at a roundtable. The monument has seen a 102 percent increase in visitors since the Obama administration designated the monument in 2014, according to the Las Cruces Green Chamber of Commerce.

HOW TO HELP COAL COMMUNITIES: The Hamilton Project at the Brookings Institution released [a report](#) on Thursday urging the addition of a 20 percent royalty on the social cost of carbon for new and renewed federal coal leases. This would generate an additional \$3 billion annually that could be used to support transitioning coal communities.

QUICK HITS

- City Report Seeks To Provide A Framework For Adapting To Climate Change. [WBUR](#).
- Canada to use economic levers to push Trump on climate change, says Dion. [CTV](#).
- Non-OPEC producers might not be scared enough to cut oil output. [CNBC](#).
- Companies on Climate: Trump or No, Still Cutting Emissions. [Wall Street Journal](#).
- Newtok to ask Obama for federal disaster declaration. [KTOO](#).
- Welcome to Beautiful Parkersburg, West Virginia. [Huffington Post](#).

HAPPENING FRIDAY

9:00 a.m. — DOE's Office of Nuclear Energy holds a meeting of the Nuclear Energy Advisory Committee, Westin Crystal City, Arlington, Va.

THAT'S ALL FOR ME!

**** A message from Vet Voice Foundation:** Tens of thousands of service members and veterans rely on public lands to hunt, fish, camp and heal from the wounds of war. These lands are part of the American heritage we fought for. As a new President and Congress look to rebuild America's infrastructure, we call on them to make an equal investment in maintaining our public lands and parks for our service members and all Americans. Support for our veterans must extend to investing in and protecting America's natural heritage, for our children and grandchildren.

www.VetVoiceFoundation.org **

To view online:

<https://www.politicopro.com/tipsheets/morning-energy/2016/12/water-infrastructure-spending-bills-delayed-in-senate-020482>

Stories from POLITICO Pro

Democrats push government toward shutdown [Back](#)

By Burgess Everett, Seung Min Kim and Ben Weyl | 12/08/2016 06:41 PM EDT

Democrats are pushing the government to the brink of a shutdown, with coal country Senate Democrats leading a strategy to oppose a GOP spending bill if their demands aren't met for a longer extension of expiring health care benefits for coal miners.

Democratic Sens. Joe Manchin of West Virginia and Sherrod Brown of , who are both up for reelection in 2018 from states won by Donald Trump, are leading the charge to get a better deal from Republican leaders. And their push helped hardened resistance to the GOP throughout the rest of the 46-member Democratic caucus as the day went on. But Republicans say they will not renegotiate a four-month extension of coal miner health benefits and that Democrats have lost all leverage after the House passed the spending bill, 326-96, and then promptly left town.

Senate Majority Leader Mitch McConnell (R-Ky.) set in motion votes to pass the bill, leaving Democrats only procedural tactics to delay the measure through Friday's funding deadline — which would put Senate Democrats in line to be blamed for a potential government shutdown. Flanked by coal miners during a biting cold outdoor news conference on Thursday evening, Manchin insisted this is "not a shutdown issue" and maintained he has a "strong commitment" from his Democratic colleagues to stand firm and demand a yearlong health care extension.

"I just want to say to everybody here, we are going to win this fight. I can't predict the exact path, but we are going to win this fight because we're right," said Sen. Chuck Schumer of New York, the ascending Democratic leader. "We want to get these beautiful people their due, and we won't stop 'til we do."

Schumer and Senate Minority Leader Harry Reid (D-Nev.), met privately with Manchin and Democratic Sens. Heidi Heitkamp of North Dakota and Mark Warner of Virginia to hash out the matter on Thursday afternoon. This followed an hours-long Democratic caucus meeting that ginned up the party in opposition to the government funding measure — which did not include a

yearlong insurance extension for miners — and a water infrastructure bill that excluded "Buy America" provisions.

"A few months extension is not sufficient," Warner said after meeting with party leaders. He chuckled when asked whether he was comfortable with a shutdown. "The solution is pretty easy. It is for our Republican friends to get this fixed."

But after all those meetings, Democrats have not come up with a viable plan to achieve their goals or rule out a government shutdown. Their hope is that they can persuade the House to unanimously pass a bill with the health care extension in it, a long-shot plan that GOP leaders say is entirely implausible.

"The House can do things when they leave. Three people show up and they do it," Brown said in an interview. "That's a solution."

AshLee Strong, a spokeswoman for House Speaker Paul Ryan, said the time for negotiation is over.

"The House just took its last votes of the year," she said after the spending bill passed the House.

The Senate will hold a rare Friday session to try to work out a last minute deal and avert a shutdown.

Republicans said that despite their tactics, Democrats are going to be on the losing end of the fight. With the House slated to leave for the year on Thursday afternoon, it became impossible for the Senate to amend the spending legislation without hauling back House members later. And Senate Republicans said their members are increasingly irked by Brown and Manchin's fight.

"They're not going to get what they want. They ought to actually be grateful for what they got," said Sen. John Cornyn, the No. 2 Senate Republican. Manchin "can make life more difficult for everybody else and kill a lot of good legislation. It's not going to advance his issue."

"If Republicans want to shut it down, they will," shot back Sen. Tim Kaine (D-Va.). "We are all committed. We want to find health care for miners and widows for a year."

Republican aides argued that it was only through McConnell's advocacy for miners that the four-month health care extension is even in the bill. One senior Republican source said that the opportunity for negotiating further is "history" now that the House is gone.

On the line is health care coverage for more than 8,000 West Virginia miners and for thousands more in other Appalachian states. A Democratic aide said that even with the four-month extension miners will get cancellation notices in January.

So Democrats said it wasn't enough and that the GOP was turning its back on the working class voters who just elected Donald Trump. Heitkamp said that Democrats believe "there has been a renewed interest in these types of issues with the election of president-elect Trump."

"They totally gave the back of their hand to miners," Sen. Claire McCaskill (D-Mo.) told reporters. "Now, who's for the working people? Where is Donald Trump on miners? Crickets."

Heitkamp and McCaskill are also up for reelection in 2018 in states that Trump won resoundingly. Sen. Bob Casey of Pennsylvania, another state Trump won, has joined Manchin and Brown in objecting to routine procedural requests. On Wednesday evening, Brown objected to a resolution observing the Pearl Harbor anniversary.

Under Senate procedure, Manchin and Brown could hold up the spending bill until Sunday, though a blockade of that length would take efforts from more Democratic senators than just those two. The government shuts down at 12:01 a.m. on Saturday without congressional action. Cornyn said that Senate won't leave until it wraps up its work, which may mean weekend work and a Monday session.

Manchin's West Virginia colleague, Sen. Shelley Moore Capito, also said she will oppose the spending legislation. But the funding bill is likely to pass when it gets a vote, Republicans said.

"They don't have the votes," said Sen. John Thune (R-S.D.). "It's just a question of how much they want to drag it out. Right now, sounds like a lot."

Manchin is scheduled to go to Trump Tower on Friday morning, just hours before the Friday shutdown deadline, and according to news reports, he might be interviewing for a job in the Trump administration.

The moderate Democrat said he would "absolutely" cancel the meeting if the senatorial dispute continued.

"I'm supposed to go in the morning, so we'll see," Manchin said. "I'm sure people would understand [if I canceled]. I've got to be here and voting."

House Appropriations Chairman Hal Rogers assured reporters a government shutdown would not happen. Asked whether his committee would have to draft a three-day stopgap bill in case the Senate doesn't clear the continuing resolution by Friday night, he said. "That call will come from leadership. We'll be ready if that happens." Asked if he would be getting on a plane after the House's final votes this afternoon, he said, "No I'm not."

Further scrambling the situation, Democrats are trying to amend water infrastructure legislation passed by the House to include permanent "Buy America" language. The fights are becoming intertwined because the spending bill and water bill are the last two major pieces of legislation in Congress this year.

"We'll see how this unfolds. We haven't made a final decision" on whether to block those bills, said Senate Minority Whip Dick Durbin (D-Ill.).

The legislation, which would maintain current funding and policy for the government through April 28, must be passed by midnight Friday. Lawmakers are eager to get home and the bill, which House Republicans unveiled Tuesday night, is largely free of controversy. And as the last train leaving the station for the 114th Congress, the so-called continuing resolution is serving as a prime vehicle for other sought-after measures designed to appeal to members on both sides of the aisle.

Elana Schor and Kaitlyn Burton contributed to this report.

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Obama's mighty EPA falls into Pruitt's hands [Back](#)

By Andrew Restuccia and Alex Guillén | 12/08/2016 08:37 PM EDT

President Barack Obama leaned hard on the Environmental Protection Agency to carry out his climate agenda, bypassing a Congress that had refused to act.

As a result, President-elect Donald Trump and Scott Pruitt will have sweeping power to turn back the clock.

Pruitt, Trump's choice for EPA administrator, is expected to begin attacking Obama's environmental legacy using courtroom drama, foot-dragging and an upending of how EPA treats the scientific consensus on climate change. But one key to his success will be the same heavy reliance on executive action that Obama employed so aggressively in his second term.

Republicans have long contended that Obama overstepped his powers, accusing him of misusing obscure provisions of laws such as the Clean Air Act to claim authority over wide swaths of the U.S. economy. But in effect, Obama has offered a perfect blueprint for Trump and Pruitt, who would have a much harder time undoing his legacy if the Democratic Congress had passed global warming legislation in 2009 or 2010.

Pruitt is expected to take especially quick aim at Obama's signature climate regulation, known as the Clean Power Plan, a suite of limits on power plants' greenhouse gas pollution that is awaiting a crucial ruling from a federal appellate court. Pruitt has been one of the leading challengers against that and other EPA regulations in his role as Oklahoma's attorney general.

"It's the end of the EPA's climate agenda," conceded David Bookbinder, the Sierra Club's former chief climate counsel. "The Clean Power Plan is dead. Let's just forget it."

Sen. [Mike Lee](#) (R-Utah) said EPA's critics should expect Pruitt to be an aggressive champion for their cause.

"As attorney general of Oklahoma, Scott Pruitt has spent years being ignored and pushed around by Washington," Lee told a gathering Thursday at the Heritage Foundation. "He knows the kind of dangerous bureaucratic mindset he's up against."

While the entirety of Pruitt's agenda is unclear, he could also chip away at the agency's efforts to slash carbon pollution from oil and gas operations, airplanes, cars and trucks.

Current and former Obama administration officials are still reeling over Trump's selection of Pruitt, worrying that years of work could be undone. "All the things that I've done in my life that I feel most professionally proud of are going to be blown up in one shape or form," one former senior administration official said.

Still, administration officials express few regrets over Obama's executive-action approach, even if it made his accomplishments more vulnerable to Trump's attacks. They said the Republican-controlled Congress could have killed a climate bill as well.

"Even if we passed climate legislation, it could go the same way that [Obama's health care law] is going," said Heather Zichal, Obama's former top energy and climate adviser. "Nothing is sacred when you have these kinds of people running the agencies."

Environmentalists promise to fight in court against any backsliding from Obama's agenda — but they also point to scientists' warnings that time is running short to forestall the most catastrophic damage from global warming. They said the harm from Pruitt's actions would be compounded if Trump pulls the U.S. out of last year's Paris climate agreement, giving other countries cover to follow suit.

"What you lose is the most precious quantity you have in the battle against climate change, which is time," said David Doniger, director of the climate program at the Natural Resources Defense Council. "We're deep into overtime already."

Pruitt would come to the job with a track record as one of the leading litigators against the agency in recent years. He has at least seven ongoing lawsuits against the agency, including cases involving its rules on power plants, smog-creating ozone and Clean Water Act protections for wetlands and waterways.

His stock in Trump World rose after several conversations with investor Carl Icahn, who played a central role in vetting Trump's EPA contenders. Icahn came away from the conversations believing that Pruitt is [open to changing](#) an obscure part of EPA's ethanol rule that the oil refinery-owning investor had been railing against for months.

Former EPA Administrator Christine Todd Whitman, who led the agency during President George W. Bush's first term, expressed deep skepticism about Pruitt's coming reign.

"I haven't seen a whole lot from him that indicates a real belief in the mission of the agency, since he's sued it on just about everything," she said. She added: "He seems to be skeptical of science, period."

Indeed, one target that has environmentalists worried is EPA's treatment of climate change science itself.

EPA issued a scientific conclusion in 2009 that greenhouse gases endanger public health and welfare, providing a necessary precursor for the agency's subsequent rules targeting carbon dioxide. But Trump has promised to review that so-called endangerment finding.

Both Trump and Pruitt have questioned the science on man-made climate change, which Trump famously [said](#) on Twitter had been "created by and for the Chinese in order to make U.S. manufacturing non-competitive." Pruitt maintains that significant disagreement exists among scientists over the cause and consequences of global warming, even though the vast majority of climate researchers say the consensus is overwhelming.

It's not clear that reversing EPA's scientific judgment would hold up in court, and even Republicans privately question whether challenging it is a wise political strategy. But litigation over the matter could take years, putting EPA climate action on the back-burner for some time.

Other ripe targets include regulations that are embroiled in court challenges, including the Clean Power Plan, which the D.C. Circuit Court of Appeals could rule on at any time. Regulations in earlier stages of their legal battles include greenhouse gas limits for new power plants, a "Waters of the United States" rule facing fierce attacks from the farming, oil and development industries, and a new standard for smog.

Pruitt could ask the courts to send those rules back to the agency for reworking. Obama used that strategy when he took office, opting not to defend several Bush administration environmental rules that were tied up in the courts and then working to undo them.

"I wouldn't be surprised if we saw something similar here," said Jeff Holmstead, a former Bush EPA official whom Trump's transition team had considered to lead the agency.

Pruitt would have an even easier time revising the regulations if the courts strike them down first. Then he could either change the agency's course or decide against regulating altogether.

Any changes to the regulations would require EPA to spend years wending through the typical rulemaking process, and most likely would face new lawsuits from supporters of the Obama versions — for example, from environmental groups or states like California or New York.

Pruitt would also play a major role in what happens to big-ticket regulations that are now in the works. Those include a review of car emissions standards for the 2022-25 model years, which EPA set four years ago with a final average target of 54.5 miles per gallon. The agency [proposed](#) keeping those goals unchanged last month, despite pleas from automakers to loosen them, but it has until April 2018 to make a final decision.

Other upcoming EPA actions include limits on carbon emissions from aircraft, [rules](#) to ensure that hard-rock miners and other industries can pay for environmental cleanups, and regularly scheduled reviews of key national air quality standards.

Some important Obama-era regulations are well beyond Pruitt's ability to roll back easily, however. Those include a first-term rule targeting pollution that drifts across state lines, an update to the standards for acid-rain-creating sulfur dioxide and a rule limiting cars' and trucks' air pollution through 2021. While Pruitt and other state attorneys general are still in court with EPA over a rule limiting mercury emissions from power plants, that rule has already taken total effect, forcing shutdowns of some of the nation's oldest, dirtiest coal plants.

More broadly, experts believe that the United States' emissions trajectory won't dramatically change in the short term, even if Pruitt abandons the Clean Power Plan. Market conditions are causing widespread switching in the power sector from carbon-heavy coal to natural gas — and federal tax credits paired with state-level policies will continue to encourage development of wind and solar energy.

Still, climate advocates can't help imagining an alternative universe in which a President Hillary Clinton had gotten to follow through on her pledges to build on Obama's climate agenda. Environmentalists had planned to press her to crack down on methane pollution from existing oil and gas operations, and perhaps on greenhouse gases from refineries and agriculture.

"There will be no further progress," Bookbinder said. "I think the real difference will not be between Obama and Trump, but between Trump and what Hillary Clinton would have done."

Eric Wolff contributed to this report.

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Republicans jockey to replace McMorris Rodgers if she takes administration job [Back](#)

A handful of House Republicans are quietly laying the groundwork to run for House GOP Conference chair amid rumors that the current holder of the job — Rep. [Cathy McMorris Rodgers](#) — will be named interior secretary, multiple sources told POLITICO.

Reps. [Mimi Walters](#) (R-Calif.), [Susan Brooks](#) (R-Ind.), [Mia Love](#) (R-Utah) and [Doug Collins](#) (R-Ga.) are exploring bids for the No. 4 position in House leadership currently filled by the Washington Republican. Some, including Walters, are already making phone calls to gauge support, the sources said.

"Should [McMorris Rodgers] be appointed to serve in the Administration, I will absolutely run for conference chair to build on the successes House Republicans have seen in the 114th Congress," Walters said in a statement for this story. "I am humbled by the support I have received in preliminary conversations, and I look forward to speaking with all the members of our Conference."

Collins, recently elected conference vice chairman, also confirmed his interest to POLITICO: "While I would consider the opportunity that comes with an open seat, I remain humbled by my recent and resounding election to Vice Chair of Conference and look forward to working with Republican leadership to serve every American."

A source familiar with the thinking of Brooks, the incoming House Ethics Committee Chair, confirmed to POLITICO she'd be interested in the post.

Love's spokesman Richard Piatt pushed back on the notion that Love was making calls to anyone but did not say if she was considering the post.

The early positioning comes as the rumor mill on Capitol Hill swirls that President-elect Donald Trump will pick McMorris Rodgers — the most senior female Republican in Congress — to run the Interior Department. Insiders predict that GOP leadership will be searching for another woman to replace her given the dearth of female Republican lawmakers in senior roles in Congress.

Walters, a 54-year-old affable freshman and former state senator, is a rising star in the conference. Love, 41, the ex-mayor of Saratoga Springs, was the first female Black Republican in Congress.

As a former federal prosecutor, who also made headlines for her astute questioning on the Benghazi investigative panel, 56-year-old Brooks is seen by her colleagues as sharp. She briefly ran for governor when Trump tapped then-Hoosier state Gov. Mike Pence as his running mate.

Collins, a 54-year-old former minister for the Air Force troops, just defeated Rep. [Bill Flores](#) for his current leadership position. If he runs for conference chair, his vice chair position would open.

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Trump 'originals' say they're getting frozen out [Back](#)

They've been with him from the beginning — when no one believed he could win, and when the Republican Party establishment wanted absolutely nothing to do with him.

But now, as President-elect Donald Trump builds out his administration, the group of loyalists who helped launch his campaign and powered its stunning early victories are growing worried they won't be getting plum jobs.

Many of them say they've heard nothing about their career prospects, and during furtive huddles, have been commiserating with each other about how they can't seem to get their calls to top Trump transition brass returned. Some are convinced that party establishment figures who've taken the reins of the transition are giving them short shrift.

Compounding their frustration is that a number of top posts are going to mainstream party figures who previously actively opposed Trump. The president-elect is seriously considering tapping Mitt Romney, a onetime leader of the Never-Trump movement, to be secretary of State. He has already made Todd Ricketts, whose family funded an anti-Trump super PAC during the primaries, deputy Commerce secretary. And on Thursday, Trump met with former Navy admiral James Stavridis, who had been vetted by Hillary Clinton as a possible vice presidential choice but now may end up in Trump's administration.

The concerns have become so intense that Karen Giorno, a Trump aide who oversaw his successful Florida campaign during the Republican primaries, recently had a telephone conversation with the president-elect in which she expressed concern that Trump loyalists wouldn't be getting White House roles. During the call, which was described by three sources, Giorno also said she was alarmed that his establishment-minded choice for White House chief of staff, outgoing Republican National Committee Chairman Reince Priebus, wouldn't support the early staffers who worked for him. (Neither Giorno nor a Trump spokesperson would comment.)

Transition officials say it's far too early for anyone to lose hope. At this juncture, the president-elect has announced only a few senior-ranking positions and has focused most of his time on filling high-level Cabinet posts. But the angst provides a window into the early machinations of a divided administration, one that was catapulted to victory by a ragtag group of conservative outsiders running against a party establishment but that now is being co-opted by that very establishment.

Roger Stone, a Republican strategist and longtime Trump friend, has given voice to the concerns. During a Wednesday appearance guest-hosting radio host Alex Jones' show, Stone said he visited Trump Tower this week and found "an armada of retreads from the old Republican Party, both the congressional wing of the party and the Romney-McCain-Bush burnouts who are trying to board this ship."

"I saw people and heard about people whose names I haven't heard in 25 to 30 years," he added. "These are people who did nothing whatsoever to elect Donald Trump and they're people who don't share Donald Trump's values. They disagree with him on trade, they disagree with him on monetary policy, they disagree with him on immigration. Yet, they seek glory and titles."

As it stands, a number of Trump originals, as they call themselves, have yet to be promised positions in the administration. That includes people like George Gigicos, Trump's director of advance, Michael Glassner, the former deputy campaign manager and Stuart Jolly, the former national field director. The staffers who led Trump's campaign in early primary states, like Matt Ciepielowski, Charles Munoz, and James Merrill, haven't been offered positions, either. Nor has

Mike Rubino, who oversaw Trump's campaign in several states, or Stephanie Milligan, who ran his Oklahoma campaign.

For some, it isn't for lack of trying. Jolly has had talks with people close to the transition, said sources briefed on the matter. But it's unclear if he's being considered for any coveted positions. Jolly declined to comment.

Some may do something else entirely. Alan Cobb, who was national director of coalitions, is working on the transition but has not been offered an administration job and instead is exploring a campaign for a soon-to-be-open congressional seat in Kansas.

There are even questions about the fates of Corey Lewandowski and Hope Hicks, two early Trump aides who have become household names. Lewandowski spent part of the week working out of Trump Tower. Hicks has frequently been at Trump's side during the transition, but other communications aides, namely Sean Spicer and Jason Miller, have taken up many of her duties.

In interviews, a handful of Trump originals, none of whom agreed to use their names, said they were deeply frustrated about the lack of clarity around their futures. Some said they had risked their careers working for Trump, having been warned by friends that they would never get another job in politics once he lost. Others said they felt cut of the loop and were struggling to get information about what's in store for them.

Most of the early campaign hires would never have been considered for the high-ranking jobs that are currently being allocated, and would be more qualified for lower-profile jobs that tend to get filled out later in the process.

But many Trump loyalists worry that no one is watching out for them, since they were brought in by Lewandowski and his allies. The campaign leadership turned over multiple times since those early days, giving them less connection to the folks who took Trump across the finish line.

Several say they feel alienated from the transition effort — especially from Priebus, an establishment figure who will be White House chief of staff. Priebus collided bitterly earlier this year with Lewandowski, who as Trump's first campaign manager hired many of the originals, and played a major role in his June firing.

While the originals fret, Priebus is moving aggressively to lock down top positions for his allies. Two Priebus lieutenants, Spicer and RNC chief of staff Katie Walsh, are expected to fill senior roles.

"Those people now have big jobs, while Corey Lewandowski, Alan Cobb, Karen Giorno and others are on the outside with their noses pressed against the glass," one early Trump campaign staffer grouched.

Those involved in the transition say they expect many of Trump's early aides to get plum jobs. It's possible, for example, that Gigicos, will be offered director of White House advance. He has overseen planning for Trump's appearance at Saturday's Army-Navy football game in Baltimore.

"Even most of the people closest to Trump have not been offered jobs," said one transition source. "I get that some of these people are concerned, but many of them have been told that they'll be taken care of. There has actually been an effort to keep them."

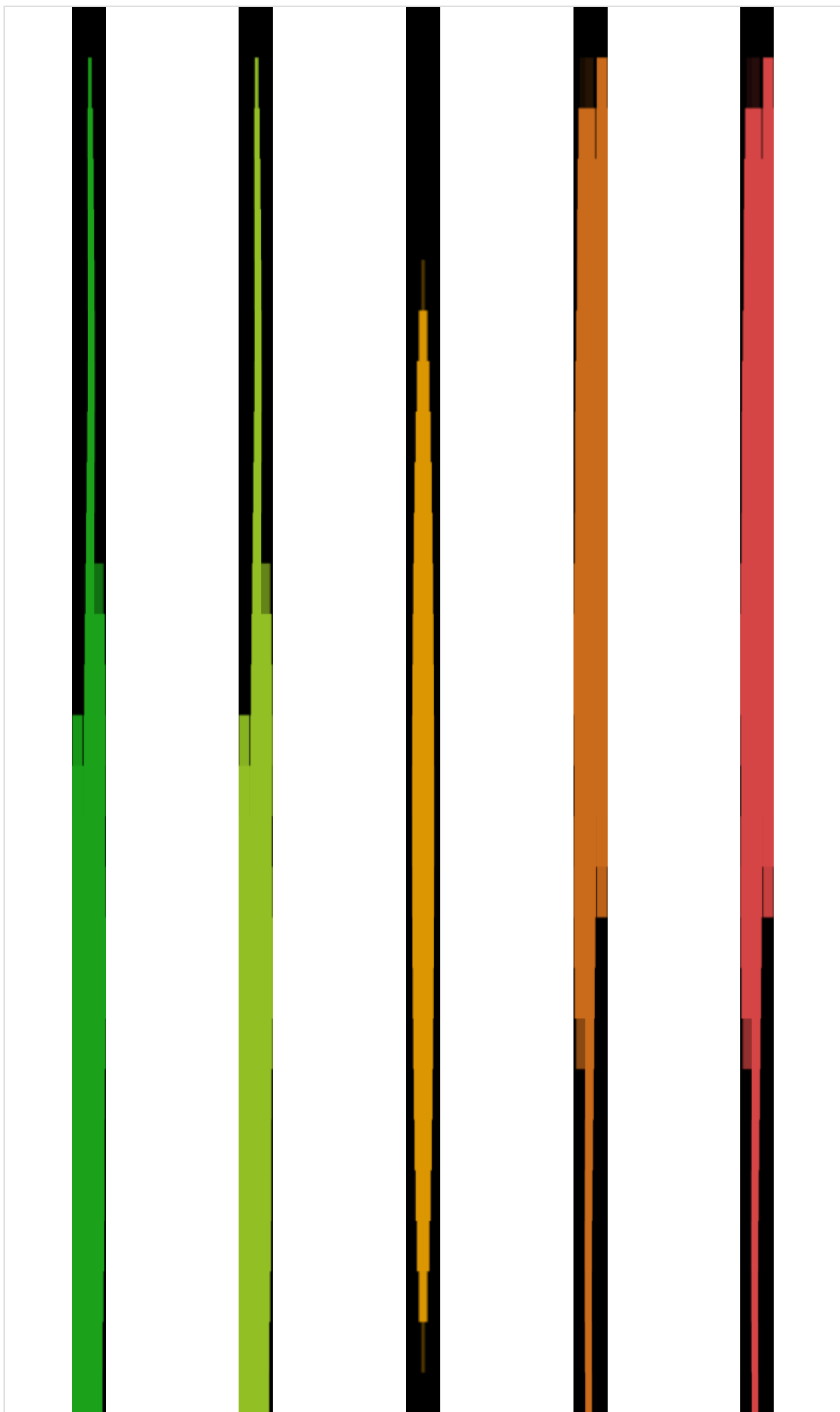
For some, the reassurance isn't enough.

"None of us are exactly Cabinet-level," said one staffer who is among those pining for a job, but so far hasn't been given any promises. "Most of us just want to do a good job and help the country, but apparently we don't play the game very well."

Yousef Saba contributed to this report.

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From: Bernhardt, David L.
Sent: Friday, December 9, 2016 9:25 AM
To: Johnny Amaral
Subject: Fwd: Successor Biological Opinion Language

FYI

David Bernhardt

Begin forwarded message:

From: "Kellogg, Matt" <Matt.Kellogg@mail.house.gov>
Date: December 9, 2016 at 9:44:55 AM EST
To: "Bernhardt, David L." <DBernhardt@BHFS.com>
Subject: RE: Successor Biological Opinion Language

I just wanted to thank you for all of your help with this. We will see what happens in the Senate but I feel pretty good since we posted 360 over here on the bill.

-Matt

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From: Emmerson, Catherine
Sent: Monday, December 12, 2016 11:04 AM
To: Karen Clark
Subject: RE: Strategy Session in January

Hi Karen,

The 26th is ideal for me but will make myself available all the days before. I will be traveling and out of the country after the 28th. Thank you for your consideration and Happy Holidays!

Sent with Good Work (www.blackberry.com)

From: Karen Clark <kclark@westlandswater.org>
Date: Monday, Dec 05, 2016, 11:32 AM
To: 'Alison MacLeod' <amacleod@ka-pow.com>, 'Carmela McHenry' <cmchenry@ka-pow.com>, 'Carolyn Jensen' <cjensen@ka-pow.com>, Emmerson, Catherine <cemmerson@sidley.com>, Dan Pope <dpope@westlandswater.org>, 'David Bernhardt' <dbernhardt@BHFS.com>, Dennis Cardoza <dcardoza@foley.com>, Denny Rehberg <drehberg@mercuryllc.com>, 'Ed Manning' <emanning@ka-pow.com>, 'Gayle Holman' <gholman@westlandswater.org>, Jennifer Walsh <jwalsh@foley.com>, Johnny Amaral <jamaral@westlandswater.org>, 'Mike Burns' <mburns@ka-pow.com>, Sheila Greene <sgreene@westlandswater.org>, Shelley Ostrowski <sostrowski@westlandswater.org>
Cc: Karen Clark <kclark@westlandswater.org>
Subject: Strategy Session in January

All,

I am in the process of scheduling an all day PR/Legislation Strategy Session in January to be held in Sacramento at KP Communications.

Please email me your availability for the following dates:

January 18

January 24

January 25

January 26

January 30

January 31

February 1

Thanks!

~Karen

Karen Clark

Executive Assistant to Thomas W. Birmingham

Westlands Water District

P.O. Box 6056

Fresno, CA 93703

(c) 559.230.9470

(f) 559.241.6277

Email: kclark@westlandswater.org

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immediately.

From: DCardoza@foley.com

Sent: Monday, December 12, 2016 12:42 PM

To: tbirmingham@westlandswater.org; Peltier Jason; Amaral Johnny; Bernhardt David Longly; Karen Catherine; Rehberg Denny; Ostrowski Michelle; JWalsh@foley.com; JThomas@foley.com; RSmith@BHFS.com; SKlug@foley.com; TBornstein@foley.com; DRalston@foley.com; KMuehleman@foley.com; Azhderian Ara; Peracchi Don; jfhurley@foley.com; Gilmore Rick; Ortega Ricardo ("Ric"); Mizuno Frances; Rubin Jon D.

Subject: Senator Feinstein - Congressman Costa

Hello All,

Wanted to share with you all that Senator Feinstein just called me and thanked our entire team for the amazing effort that was put forward on the Warda Bill. She was particularly impressed with the vote on Cloture and the vote on final passage. She made clear we have much more work to do and she is writing an op-ed on the many benefits to the California water delivery system and for the environment, that were included in the Warda Bill.

Congressman Costa also wrote us a note of congratulations and thanks, and looks forward the pressing the fight next year.

Once again great job!

Dennis

Sent from my iPhone

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From: Dan Pope
Sent: Monday, December 12, 2016 1:15 PM
To: 'Karen Clark'
Subject: RE: Strategy Session in January

Karen,

I currently have no objections on the proposed dates. I have asked Cheri Worthy to send their 2017 meeting calendar to you to make certain nothing would conflict.

Dan

From: Karen Clark [mailto:kclark@westlandswater.org]
Sent: Monday, December 5, 2016 10:33 AM
To: 'Alison MacLeod'; 'Carmela McHenry'; 'Carolyn Jensen'; Catherine Karen; Dan Pope; 'David Bernhardt'; Dennis Cardoza; Denny Rehberg; 'Ed Manning'; 'Gayle Holman'; Jennifer Walsh; Johnny Amaral; 'Mike Burns'; Sheila Greene; Shelley Ostrowski
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Thanks!

~Karen

Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) 559.230.9470
(f) 559.241.6277
Email: kclark@westlandswater.org

From: Karen Clark
Sent: Monday, December 12, 2016 3:23 PM
To: 'Emmerson, Catherine'
Subject: RE: Strategy Session in January

Thanks, Catherine. I heard you got married so Congratulations! I am very happy for you and am sure that the holidays will be wonderful with your husband ☺

~Karen

Karen Clark
Executive Assistant to Thomas W. Birmingham
Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) 559.230.9470
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Cc: Karen Clark <kclark@westlandswater.org>
Subject: Strategy Session in January

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Please email me your availability for the following dates:

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January 24

January 25

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February 1

Thanks!

~Karen

Karen Clark

Executive Assistant to Thomas W. Birmingham

Westlands Water District

P.O. Box 6056

Fresno, CA 93703

(c) 559.230.9470

(f) 559.241.6277

Email: kclark@westlandswater.org

This e-mail is sent by a law firm and may contain information that is privileged or confidential.
If you are not the intended recipient, please delete the e-mail and any attachments and notify us
immediately.

From: Karen Clark

Sent: Monday, December 12, 2016 3:55 PM

To: 'Alison MacLeod'; 'Carmela McHenry'; 'Carolyn Jensen'; 'Catherine Karen'; 'Dan Pope'; 'David Bernhardt'; 'Dennis Cardoza'; 'Denny Rehberg'; 'Ed Manning'; 'Gayle Holman'; 'Jennifer Walsh'; 'Johnny Amaral'; 'Mike Burns'; 'Sheila Greene'; 'Shelley Ostrowski'; 'Philip Williams'; Don Peracchi

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Sincerely,

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Westlands Water District

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Email: kclark@westlandswater.org

From: Karen Clark [mailto:kclark@westlandswater.org]

Sent: Monday, December 05, 2016 10:33 AM

To: 'Alison MacLeod'; 'Carmela McHenry'; 'Carolyn Jensen'; Catherine Karen; Dan Pope; 'David Bernhardt'; Dennis Cardoza; Denny Rehberg; 'Ed Manning'; 'Gayle Holman'; Jennifer Walsh; Johnny Amaral; 'Mike Burns'; Sheila Greene; Shelley Ostrowski

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CC: Karen Clark
Subject: FW: PR/Legislation Strategy Session

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Email: kclark@westlandswater.org

From: Emmerson, Catherine
Sent: Monday, December 12, 2016 4:32 PM
To: Karen Clark
Subject: RE: Strategy Session in January

Thank you. Yes married to a California cowboy! Super happy.

Sent with Good Work (www.blackberry.com)

From: Karen Clark <kclark@westlandswater.org>
Date: Monday, Dec 12, 2016, 5:22 PM
To: Emmerson, Catherine <cemmerson@sidley.com>
Subject: RE: Strategy Session in January

Thanks, Catherine. I heard you got married so Congratulations! I am very happy for you and am sure that the holidays will be wonderful with your husband ☺

~Karen

Karen Clark
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(c) 559.230.9470
(f) 559.241.6277
Email: kclark@westlandswater.org

From: Emmerson, Catherine [mailto:cemmerson@sidley.com]
Sent: Monday, December 12, 2016 10:04 AM
To: Karen Clark
Subject: RE: Strategy Session in January

Hi Karen,

The 26th is ideal for me but will make myself available all the days before. I will be traveling and out of the country after the 28th. Thank you for your consideration and Happy Holidays!

Sent with Good Work (www.blackberry.com)

From: Karen Clark <kclark@westlandswater.org>
Date: Monday, Dec 05, 2016, 11:32 AM
To: 'Alison MacLeod' <amacleod@ka-pow.com>, 'Carmela McHenry' <cmchenry@ka-pow.com>, 'Carolyn Jensen' <cjensen@ka-pow.com>, Emmerson, Catherine <cemmerson@sidley.com>, Dan Pope <dpope@westlandswater.org>, 'David Bernhardt' <dbernhardt@BHFS.com>, Dennis Cardoza <dcardoza@foley.com>, Denny Rehberg <drehberg@mercuryllc.com>, 'Ed Manning' <emanning@ka-pow.com>, 'Gayle Holman' <gholman@westlandswater.org>, Jennifer Walsh <jwalsh@foley.com>, Johnny Amaral <jamaral@westlandswater.org>, 'Mike Burns' <mburns@ka-pow.com>, Sheila Greene <sgreene@westlandswater.org>, Shelley Ostrowski <sostrowski@westlandswater.org>
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If you are not the intended recipient, please delete the e-mail and any attachments and notify us immediately.

From: Bernhardt, David L.
Sent: Tuesday, December 13, 2016 2:52 PM
To: Johnny Amaral
Subject: Fwd: POLITICO Pro Breaking News: Trump selects Zinke as Interior secretary

David Bernhardt

Begin forwarded message:

From: "Hrobsky, Jon A." <JHrobsky@BHFS.com>
Date: December 13, 2016 at 4:46:00 PM EST
To: "Bernhardt, David L." <DBernhardt@BHFS.com>
Cc: "Johnson, Luke D." <LJJohnson@BHFS.com>
Subject: Fwd: POLITICO Pro Breaking News: Trump selects Zinke as Interior secretary

That is definitely a tough guy.

Begin forwarded message:

From: POLITICO Pro <politicoemail@politicopro.com>
Date: December 13, 2016 at 4:44:43 PM EST
To: <jhrobsky@BHFS.com>
Subject: POLITICO Pro Breaking News: Trump selects Zinke as Interior secretary
Reply-To: POLITICO subscriptions <reply-fe9412717361047871-591782_HTML-637933642-1376319-0@politicoemail.com>

President-elect Donald Trump has offered the Interior secretary position to Montana's freshman Rep. Ryan Zinke, an ex-Navy Seal commander, according to two transition officials and someone familiar with the offer.

The sources said Zinke has yet to accept and has given no indication as to which way he is leaning. But Zinke is also being discussed by prominent Washington Republicans as a possible 2018 candidate for the Montana Senate seat now held by Democrat Sen. Jon Tester.

Zinke's office declined to comment, and Trump's transition team did not immediately respond to a request for comment.

Zinke was an early Trump supporter. The Big Sky state Republican threw his weight behind the controversial nominee-turned-commander-in-chief in late May and stuck by him despite numerous Democratic attacks for doing so. He also campaigned with him, and his wife, Lola, is a member of the transition team dealing with veterans issues.

To change your alert settings, please go to
<https://www.politicopro.com/settings>

This email was sent to jhrobsky@BHFS.com by: POLITICO, LLC 1000 Wilson Blvd. Arlington, VA, 22209, USA

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From: Bernhardt, David L.
Sent: Thursday, December 15, 2016 8:19 AM
To: Johnny Amaral
Subject: Zinke

Is now official

David Bernhardt

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From: Johnny Amaral
Sent: Thursday, December 15, 2016 8:21 AM
To: Bernhardt, David L.
Subject: Re: Zinke

Cool

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

> On Dec 15, 2016, at 7:20 AM, Bernhardt, David L. <DBernhardt@BHFS.com> wrote:

>

> Is now official

>

> David Bernhardt

>

>

>

> STATEMENT OF CONFIDENTIALITY & DISCLAIMER: The information contained in this email message is attorney privileged and confidential, intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this email is strictly prohibited. If you have received this email in error, please notify us immediately by calling (303)-223-1300 and delete the message. Thank you.

From: Carmela McHenry
Sent: Monday, December 19, 2016 9:59 AM
To: 'Karen Clark'
Subject: RE: PR/Legislation Strategy Session

Hi Karen:

Hope you had a nice weekend.

Sorry for the delay in responding as I was out of the office last week.

I am more than happy to make the breakfast/lunch arrangements for the meeting on February 1st. No need to give me a credit card. We have an account with Hannibal's Catering, so KP will send an invoice to WWD at the end of the month in February. I'll touch base with you, in January, to get your approval with the food set-up.

If you have any questions, please let me know. Happy Holidays to you and yours! ☺

Take care,

Carmela

Carmela McHenry

KP PUBLIC AFFAIRS
(Direct) 916-498-7711
(Fax) 916-448-4923

From: Karen Clark [mailto:kclark@westlandswater.org]
Sent: Monday, December 12, 2016 2:57 PM
To: Carmela McHenry
Cc: Karen Clark
Subject: FW: PR/Legislation Strategy Session

Hello Carmela,

Would you please have food available for this day? Muffins and coffee/tea/juice/water in the morning and sandwiches, etc for lunch? I would be happy to give you my credit card. Just let me know when you are back in the office.

Thanks!

~Karen

Karen Clark
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Westlands Water District
P.O. Box 6056
Fresno, CA 93703
(c) 559.230.9470
(f) 559.241.6277
Email: kclark@westlandswater.org

From: Karen Clark [<mailto:kclark@westlandswater.org>]

Sent: Monday, December 12, 2016 2:55 PM

To: 'Alison MacLeod'; 'Carmela McHenry'; 'Carolyn Jensen'; 'Catherine Karen'; 'Dan Pope'; 'David Bernhardt'; 'Dennis Cardoza'; 'Denny Rehberg'; 'Ed Manning'; 'Gayle Holman'; 'Jennifer Walsh'; 'Johnny Amaral'; 'Mike Burns'; 'Sheila Greene'; 'Shelley Ostrowski'

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From: Karen Clark
Sent: Monday, December 19, 2016 11:30 AM
To: 'Carmela McHenry'
Subject: RE: PR/Legislation Strategy Session

Thank you so much, Carmela ☺ I hope you have Merry Christmas and Happy New Year! ☺

~Karen

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From: Carmela McHenry
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You're welcome, Karen. ☺

Best,

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Carmela McHenry
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Email: kclark@westlandswater.org

From: The Steamboat Institute
Sent: Monday, December 19, 2016 1:30 PM
To: tbirmingham@westlandswater.org
Subject: Meet the new Secretary of the Interior

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THE PATH FORWARD: AMERICA IN 2017 AND BEYOND

SATURDAY, FEBRUARY 25, 2017
SEASCAPE BEACH RESORT • MONTEREY BAY



U.S. Rep. Ryan Zinke (MT), *nominee for Secretary of the Interior*, to speak at Steamboat Institute's California Summit

Congressman Zinke is a 23-year U.S. Navy SEAL veteran. In 2014, he became the first Navy SEAL elected to the U.S. House of Representatives. He has served on the House Committee on Natural Resources and the House Armed Services Committee. [Read more....](#)

Register Now!

* Summit registration: \$250 by December 31st; \$295 after December 31st

* Platinum Individual Sponsor registration: \$1,000 (\$750 is tax-deductible)
sponsor registration includes private VIP receptions on Friday and Saturday evenings with our speakers, plus photo opp with dinner keynote speaker

[Click here to view all registration options.](#)

Please join us in the spectacular setting of the **Seascape Beach Resort on Monterey Bay** (Aptos, California) for this 1-day summit on **Saturday, February 25, 2017**.

*Lodging rates start at just **\$189 per night**. Call 831-688-6800 and mention Steamboat Institute.*

Sponsors are invited to a private welcome reception with our speakers on Friday evening, February 24.



The summit will conclude on Saturday evening with our keynote dinner on a bluff overlooking Monterey Bay.

Register Now!

ADDITIONAL FEATURED SPEAKERS INCLUDE:



Victor Davis Hanson
Senior Fellow
Hoover Institution



Mary Kissel
Wall Street Journal
Editorial Board



Peter Brookes
Senior Fellow,
National Security Affairs
Heritage Foundation



Hadley Heath Manning
Tony Blankley Fellow,
Steamboat Institute
Health Policy Director,
Independent Women's Forum



Daniel J. Mitchell
Senior Fellow
Cato Institute



Lt. Gen. (Ret.) Michael T. Flynn
National Security Adviser
to President-elect Trump
(Invited)



David L. Bernhardt
Served as Chief Counsel for
Department of the Interior;
Member of Trump Transition
Team for Interior



Amy Oliver Cooke
Director of Energy Policy
Center - Independence Institute
Member of Trump Transition
Team for EPA



Charlie McNeil
Founder and CEO
NexGen Resources Corp.

Watch for more speaker announcements coming soon!

For special lodging rates, [click here](#) or call 831-688-6800 and mention the Steamboat Institute.

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The Steamboat Institute, P.O. Box 883037, Steamboat Springs, CO 80488

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Sent by info@steamboatinstitute.org in collaboration with



Try it free today

From: David Bernhardt
Sent: Tuesday, December 20, 2016 6:34 AM
To: Thomas W. (Tom) Birmingham Esq.; Johnny Amaral
Subject: Fwd: McCarthy Facebook Ad on CA Water Victory

David Bernhardt
[REDACTED]

Begin forwarded message:

From: "Hrobsky, Jon A." <JHrobsky@BHFS.com>
Date: December 20, 2016 at 4:22:26 AM PST
To: "Bernhardt, David L." <DBernhardt@BHFS.com>, "Smith, Ryan A." <RSmith@BHFS.com>, "Johnson, Luke D." <LJohnson@BHFS.com>
Subject: McCarthy Facebook Ad on CA Water Victory

<https://www.facebook.com/kevinomccarthy/videos/10154840068551103/>

Jon Hrobsky
Policy Director
Brownstein Hyatt Farber Schreck
Energy, Environment & Resource Strategies
202-872-5294 (Direct)
202-[REDACTED]-[REDACTED] (Cell)

From: Johnny Amaral
Sent: Wednesday, December 21, 2016 7:50 PM
To: Jason R. Phillips
CC: Paul Simmons
Subject: Re: Language

Bernhardt isn't available until 8:15 am PST. Is that ok?

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

> On Dec 21, 2016, at 3:06 PM, Jason R. Phillips <jphillips@friantwater.org> wrote:

>

> 1-866-893-0375, 5626900#

> _____

> This communication, including any attachments or embedded links, is for the sole use of the intended recipient(s) and may contain information that is confidential or legally protected. If you are not the intended recipient, you are hereby notified that any review, disclosure, copying, dissemination, distribution or use of this communication is strictly prohibited. If you have received this communication in error, please do not download any attachments or embedded links, notify the sender immediately by return e-mail message or call, and delete the original and all copies of the communication from your system. Thank you for your anticipated cooperation.

> <meeting.ics>

From: Jason R. Phillips
Sent: Wednesday, December 21, 2016 7:51 PM
To: Johnny Amaral
CC: Paul Simmons
Subject: Re: Language

Yes.

Sent from my iPhone

> On Dec 21, 2016, at 6:50 PM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

>

> Bernhardt isn't available until 8:15 am PST. Is that ok?

>

> Best,

>

> Johnny Amaral

> Deputy General Manager - External Affairs

> Westlands Water District

>

>

>> On Dec 21, 2016, at 3:06 PM, Jason R. Phillips <jphillips@friantwater.org> wrote:

>>

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>> <meeting.ics>

>

>

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From: Johnny Amaral
Sent: Thursday, December 22, 2016 11:33 AM
To: David L. Bernhardt
Subject: Fwd: Deputy Assistant Secretary, Fish, Wildlife, and Parks
Attachments: McClain_ Short_Form_Resume.PDF; Final White Paper 122016.pdf

Best,

Johnny Amaral
Deputy General Manager - External Affairs
Westlands Water District

Begin forwarded message:

From: Tom Birmingham <tbirmingham@westlandswater.org>
Date: December 22, 2016 at 9:51:07 AM PST
To: "zzNunes, Devin" <Devinhr2403@mail.house.gov>
Cc: "Ratekin, Anthony" <Anthony.Ratekin@mail.house.gov>, 'Johnny Amaral' <jamaral@westlandswater.org>
Subject: Deputy Assistant Secretary, Fish, Wildlife, and Parks

Devin,

Yesterday when we met, you inquired about potential candidates for Interior, particularly people who could serve in positions to oversee Fish and Wildlife. Attached are a short resume of and a paper written by an individual who is interested in serving as a Deputy Assistant Secretary for Fish, Wildlife, and Parks. It is my understanding that this is not a position that requires Senate confirmation.

Tom

David W. McClain

9023 SW 176th Ave

Beaverton, Oregon

Mr. McClain has 40 years' experience developing energy projects throughout the United States. Has managed two startup companies from zero assets to become major independent energy developers. He specializes in development and construction management of complex projects involving multiple layers of federal, state and local jurisdictions. He has lead multidisciplinary teams of civil, mechanical and electrical engineers, biological resource specialist, atmospheric scientist, permitting specialist, legal teams and project finance teams in the successful completion of several thousand megawatts of energy projects involving coal, natural gas, geothermal, biomass and wind energy development. He is a recognized for creating common sense habitat mitigation programs for large energy infrastructure projects and successful permitting strategies. He brings to development an understanding of federal, state and local regulatory requirements as well as construction experience and a strong background in ecological science. Throughout his career he has been responsible for successful development of multiple environmental mitigation programs involving state and federal agencies including compliance with the Endangered Species Act.

His work history includes:

- **2006-Present: Everpower Wind Energy Holdings Co., Sr. Director of Development**
- **1996-2006: DW McClain & Associates, Consultant**
- **1992-1996: MidAmerican Energy Company, Development & Operations Manager**
- **1990-1992: CE Exploration Company, General Manager**
- **1985-1990: California Energy Company Inc., Manager of Project Development**
- **1980-1985: Morrison Knudsen Inc., Power Group Head, Environmental Studies**
- **1978-1980: State of Idaho, Office of the Governor, Natural Resource Staff**
- **1977-1978: Oregon Institute of Technology, GeoHeat Center, Research Faculty**
- **1976-1977: University of Idaho College of Mines, Associate Faculty, Research Fellow**

Education

- **1974, B. Sc. Geology, University of Oregon**
- **1978, Masters in Geography and Natural Resource Management, University of Idaho**

Public Service History

- **Northwest Intermountain & Power Producers Coalition**
- **Deschutes Ecosystem Management Advisory Committee**
- **PNW Regional BLM Resource Advisory Group**
- **Newberry National Volcanic Monument Committee**

Reforming the U.S. Fish and Wildlife Service and Endangered Species Act

David McClain

The Problem

The completion of massive infrastructure development in the United States occurred before enactment of the Endangered Species Act in 1973. The backbone of the country's interstate highway system, intracoastal waterway, oil and gas pipeline network, high voltage electric power grid, airport expansions, and flood control systems were completed before 1973. While incremental expansion of our most essential infrastructure has proceeded, new major infrastructure efforts have not, in large part due to the Endangered Species Act. Before we can meaningfully expand our national infrastructure the inflexible nature of the Endangered Species Act must be corrected.

The Endangered Species Act (ESA, the "Act") is regularly used to delay and/or prevent responsible economic activity. And ironically, the Act has done little to protect endangered or "threatened" species. The Act's administration by the U.S. Fish & Wildlife Service has resulted in less than 2% of the listed species having recovered since the ESA was enacted in 1973. Reforming the Endangered Species Act must begin with creative and substantial reform of the U.S. Fish & Wildlife Service (USF&WS, Service), which administers it.

The ESA is abused by extreme interpretations of its intent. In addition to arresting infrastructure construction, faulty administration of the law regularly prevents responsible development of energy resources, radically affects ranching, farming, timber, and other productive use of private and public lands.

The last time the Endangered Species Act and the U.S. Fish and Wildlife Service underwent major reform was during Clinton Administration. At that time, an agency wide "reorganization" removed or reassigned administrators who did not agree with the incoming administration's distorted interpretation of the law. One consequence of this intentional radicalization was the unjustified listing of the Spotted Owl and resultant decimation of the Pacific Northwest timber industry. President George W. Bush accomplished little to reverse this institutionalized prejudice, which the Obama Administration reinforced.

For nearly a quarter century the USF&WS has been run by an anti-development staff, which has resisted even feeble attempts at reform. It should come as no surprise that the immediate past Principal Deputy Assistant Secretary of Interior for Fish and Wildlife and Parks, Michael Bean, previously led Wildlife Programs for the Environmental Defense Fund.

The Solution

The first step to reform the Endangered Species Act to undo the damage already done is to fundamentally change the perverse culture of the U.S. Fish and Wildlife Service. The new Deputy Assistant Secretary overseeing the Service and the National Parks must understand

the radical preservationist arm of the environmental movement while being fully conversant of the resource stewardship responsibilities of the National Park Service, National Wildlife Refuge System and the Endangered Species Act. The new appointee must be qualified to aggressively reform the agency and work with Congress to modify the Endangered Species Act while also reorienting the management of the National Parks and Wildlife Refuges.

The USF&WS has focused on responding to listing petitions and litigation and intervening to prevent implementation of timber management, mineral leasing, energy development, grazing and other uses of public and private lands. The Service's bureaucrats are committed to preventing land use activity rather than taking action to recover species. They have resisted working with the states and project developers to create mitigation programs and mitigation banks to enhance recovery of species truly at risk. The staff claim they are limited by the current law which is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." (16 USC 1531 (b)). This interpretation is merely a rationalization for the staff's radical agenda to resist development at all levels of federal, state and local decision making.

Under a Trump Administration there needs to be mechanisms for creation and funding of mitigation banks, by both private and public sources. These investments in wildlife preservation must meaningfully advance wildlife habitat. New legislation is not needed to create mitigation banking, Federal agencies, under section 404 of the Clean Water Act, can require and cooperate to mitigate for the disturbance of a wetland, stream, or endangered species habitat. This type of program can be expanded to promote the recovery of species populations. Mitigation banks often provide higher ecological quality than the impacts they offset. By consolidating mitigation compensation from multiple development activities, banks that are properly maintained and monitored can provide superior ecosystem services at reduced cost. Conservation easements often require funding of a trust specifically dedicated to the long term management of the natural resources the bank is designed to preserve. And most importantly, mitigation banks enable development to move forward. They help ensure no net loss of habitat while reducing the regulatory burden dampening development. Today, the "no net loss of habitat" principle is used by environmentalists in collaboration with USF&WS personnel to resist development instead of working to assure replacement of impacted areas with ecologically functional equivalences by way of mitigation banking.

How the U.S. Fish & Wildlife Service Abuses the Endangered Species Act

The administration of the Endangered Species Act has four essential programs described below.

- **Section 4** authorizes the Service to identify endangered and threatened species. This is the listing function of the ESA and is used to designate "critical habitat" and develop a "recovery plan" for such purposes. More often than not, the USF&WS

charge to preserve critical habitat and form recovery plans translates into ironclad restrictions on land use while dismissing offsets such as mitigation banking .

- **Section 7** requires all federal agencies using the “best scientific and commercial data available” in order to “consult” with U.S. Fish & Wildlife Service or the National Marine Fisheries Service (depending upon the species) to ensure that planned “federal actions” do not “jeopardize” the continued existence of listed species or “adversely modify their critical habitat”. This requirement, grants to USF&WS a virtual veto authority over all other federal actions. The effect of these provisions can be readily seen in delayed or reconfigured construction projects and restrictive measures built into federal forest harvests, grazing plans and energy and mineral leasing.
- **Section 9** requires that all persons, including all private and public entities subject to federal jurisdiction avoid committing a “take” of listed endangered species. The statute defines “take”, which is intended to mean the inadvertent slaying of a protected individual species to include “harm”. Using this overly broad definition the Service includes significant modification of habitat whether or not it leads to an actual death or injury. USF&WS routinely issues letters to potential users of public and private lands warning that their proposed action “may” result in a take, which would trigger financial penalties and even criminal prosecution. In consultation meetings with Service personnel developers often find staff from the USF&WS’ Office of Law Enforcement on hand, an intimidation implying the proposed development is a potentially illegal or “un-lawful” activity. Regardless, the agency does not readily issue “take” permits and its conditions for issuing them, when they do, are protracted, burdensome and insufficiently respectful of property rights holders and the project sponsor.
- **Section 10** establishes criteria for USF&WS to approve “incidental take” of listed species. Although not explicitly defined by law, “incidental take” is described in Section 10 of ESA as “take that is incidental to and not the purpose of the carrying out of an otherwise lawful activity”. Although the statute provides for the issuance of a “take” permit, the Service’s leadership routinely treats all proposed activity as a purposeful and intentional abuse of the ESA. The current program intentionally frustrates lacks the ability to create a workable permit program that provides project developers with clear direction. This hostile and non-cooperative attitude explains why future infrastructure projects will be stalled, litigated and significantly delayed if not outright cancelled.

Projects that have even a limited potential of affecting a listed species, and almost all large infrastructure project do, will run a gauntlet of strict prohibitions against “take” sketched out in Section 9 of the ESA. Project sponsors will have to apply for and receive an

Incidental Take Permit as provided for under Section 10 of Endangered Species Act. The Incidental Take Permit application requires a Habitat Conservation Plan, which outlines the nature of the proposed project, potential effects on listed species, proposed mitigation measures and the funding measures. The intent of the Habitat Conservation Plan is to ensure that the sponsor's project will only harm a listed species in a manner incidental to its lawful operations and that impacts will be minimized. This process can take several years during which USF&WS its evaluative criteria for baseline data, and makes unreasonable demands for avoidance and imposes unjustified, cost-prohibitive mitigation protocols.

Currently, "ad hoc" committees of agency biologists determine "practical and enforceable" methods, which characterize the suitability of management plans. In other words, they *make it up as they go along* with what they believe is the best available science.

Because there are no established thresholds of allowed take and each case is evaluated based on limited data and perceived impact on a species population the issuance of a take permit devolves into an obstacle course, which varies by regional office and the inclinations of that office's personnel. Proposed projects, which have all other required authorizations to proceed, are hung up on extraordinarily complex, burdensome and ambiguous criteria in the name of ESA compliance.

There is an urgent need to simplify the criteria for Section 10 take permits that are "incidental to and not the purpose of the carrying out of an otherwise lawful activity". For example, Congress should amend the ESA to make issuance of a take permit mandatory provided the petitioner has collected one year of baseline data, prepared a Habitat Conservation Plan, and can show with a statistically valid estimate that the potential take will be less than 0.5% of the entire species population. The issuance of the take permit should be subject to a commitment to provide off setting mitigation. Congress should also authorize the establishment and sustained funding of habitat mitigation banks paid for by project sponsors.

Litigation under ESA is another problem, which effects the Act's efficient and timely management. Under the Obama Administration the number of petitions for listing of species has increased dramatically. Major environmental groups have abused the petition process by filing hundreds of species under petitions thereby forcing USF&WS to make voluminous listing decisions. An egregious example of this abuse: a single petition, which included 400 species. This aggressive conservationist strategy is intended to overwhelm the Service with listing petitions and then sue and settle with it. The environmentalists' "Sue and Settle" strategy clearly undermines the ESA and creates "analysis paralysis" within the federal bureaucracy. This abuse effects not only USF&WS but other federal agencies that make land use decisions, including the Bureau of Land Management, Department of Defense, Army Corps of Engineers, Department of Energy, and the Department of Transportation.

It is time to force the U.S. Fish and Wildlife Service to refocus on the intent of the Endangered Species Act to protect and recover species while allowing for necessary economic activity and expansion of the nation's infrastructure. The USF&WS must cease serving special interest groups and rewarding environmental lawyers and promote mitigation programs that will stabilize and improve species populations through public and private partnerships.

A Reform Agenda That Will Work

New leadership at the U.S. Fish and Wildlife Service needs to reinvent itself with a culture that delivers transparent regulatory decisions based on realistic scientific standards. New leadership overseeing the Service needs to be prepared to work with the Congress to reform the Endangered Species Act itself. Taken together the result would be consistent, fair and effective implementation of the law's original intent.

True reform would create the following outcomes:

- Focus on species recovery rather than development restrictions.
- List only truly at risk species instead of politically motivated listings, such as the sage grouse, which imposed greater restrictions on grazing and energy development of federal lands. (The sage grouse was later found not to even warrant listing as a "candidate species" well short of "threatened".)
- Encourage the efforts of states, tribes, local units of government and private landowners to protect habitat and deliver meaningful mitigation. This proactive work would deploy habitat banking and conservation plans and easements to resolve real problems.
- Cut off the payment of taxpayer dollars to cover the attorney fees of litigating special interest groups that fosters the "Sue and Settle" abuses.
- Require more transparency and accountability of data and science used in ESA decision-making.
- Establish thresholds of allowed take, which grant take permits for development and other proposed actions, which have legal rights and authorizations to proceed. For example, make issuance of a take permit mandatory provided the developer has one year of baseline data, a Habitat Conservation Plan, a statistically valid estimate of potential take of less than 0.5% of the entire resident species population.
- List only one species per petition and eliminate "Sue and Settle" litigation opportunities.
- Require USF&WS to base its listing decisions on at least two credible scientific studies published in peer reviewed journals from at least two scientists or teams of scientist working independently.

A historical review of Endangered Species Act suggests that after 24 years of policy implementation, continual changing permitting criteria and aggressive environmental litigation, there is no reliable template for infrastructure projects to comply with the

Endangered Species Act. Reform of the Service must take into consideration citizen suits under provisions of Endangered Species Act. The courts have adopted a low evidentiary standard for establishing whether an activity is likely to harm a listed species and trigger a listing. Reform of the Act must establish a threshold of compliance resulting in projects qualifying for exemption or for mandatory issuance of a take permit with mitigation in order to limit litigation.

There is no simple fix to the challenges posed by USF&WS' interpretation of the Endangered Species Act. The ESA has been abused for two and a half decades. Advancement of a new era of infrastructure construction and resource development will be slowed, if not frequently curtailed until federal administration of the Endangered Species Act is reconstituted and ultimately reformed.

David McClain, 12/21/16

Beaverton, Oregon

From: Tom Birmingham

Sent: Thursday, December 22, 2016 11:34 AM

To: 'Bernhardt, David L.'; 'Smith, Ryan A.'; 'Denny Rehberg'; DCardoza@foley.com; 'Jennifer Walsh - Foley'; 'Emmerson, Catherine'; 'Ed Manning'; 'Carolyn Jensen'; 'Mike Burns'; 'Michelle Ostrowski'; 'Johnny Amaral'; 'Gayle Holman'; Dan W. Pope; 'Sheila Greene'; 'Jason Peltier'

Subject: Friday's Weekly Conference Call

Ladies and Gentlemen,

December 23 is a holiday for Westlands Water District, and our weekly call is cancelled.

I would like to take this opportunity to thank each of you for the work you have done on behalf of the District. During the last twelve months, we have made significant progress in advancing legislation that furthers the District's interests, and none of that progress would have been achieved without your contribution. Thank you. Let us pray that the momentum started in 2016 will continue in 2017.

Please forward this email to members of your team that I did not include in the email.

Happy Hanukkah and Merry Christmas.

Tom

From: Gayle Holman
Sent: Thursday, December 22, 2016 1:20 PM
To: 'Tom Birmingham'
Subject: RE: Friday's Weekly Conference Call

Thanks Tom! Have a joyous Christmas season!

Gayle

Gayle Holman
Public Affairs Representative
Westlands Water District
3130 N. Fresno Street
P.O. Box 6056
Fresno, CA 93703-6056
(559) 241-6233 (direct)
(559) [REDACTED] (cell)
(559) 241-6277 (fax)
gholman@westlandswater.org

From: Tom Birmingham [mailto:tbirmingham@westlandswater.org]
Sent: Thursday, December 22, 2016 10:34 AM
To: 'Bernhardt, David L.'; 'Smith, Ryan A.'; 'Denny Rehberg'; DCardoza@foley.com; 'Jennifer Walsh - Foley'; 'Emmerson, Catherine'; 'Ed Manning'; 'Carolyn Jensen'; 'Mike Burns'; Michelle Ostrowski; 'Johnny Amaral'; 'Gayle Holman'; Dan W. Pope; 'Sheila Greene'; 'Jason Peltier'
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Please forward this email to members of your team that I did not include in the email.

Happy Hanukkah and Merry Christmas.

Tom

From: Emmerson, Catherine
Sent: Thursday, December 22, 2016 1:30 PM
To: Tom Birmingham
Subject: RE: Friday's Weekly Conference Call

Happy Holidays to you, Tom, from Cabo. My best wishes to you and your family in 2017!

Sent with Good Work (www.blackberry.com)

From: Tom Birmingham <tbirmingham@westlandswater.org>
Date: Thursday, Dec 22, 2016, 11:34 AM
To: 'Bernhardt, David L.' <DBernhardt@BHFS.com>, 'Smith, Ryan A.' <RSmith@BHFS.com>, 'Denny Rehberg' <DRehberg@mercuryllc.com>, DCardoza@foley.com <DCardoza@foley.com>, 'Jennifer Walsh - Foley' <jwalsh@foley.com>, Emmerson, Catherine <cemmerson@sidley.com>, 'Ed Manning' <emanning@ka-pow.com>, 'Carolyn Jensen' <cjensen@ka-pow.com>, 'Mike Burns' <mburns@ka-pow.com>, Michelle Ostrowski <mostrowski@westlandswater.org>, 'Johnny Amaral' <jamaral@westlandswater.org>, 'Gayle Holman' <gholman@westlandswater.org>, Dan W. Pope <dpope@westlandswater.org>, 'Sheila Greene' <sgreene@westlandswater.org>, 'Jason Peltier' <jason.peltier@sldmwa.org>
Subject: Friday's Weekly Conference Call

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Please forward this email to members of your team that I did not include in the email.

Happy Hanukkah and Merry Christmas.

Tom

This e-mail is sent by a law firm and may contain information that is privileged or confidential. If you are not the intended recipient, please delete the e-mail and any attachments and notify us immediately.

From: Johnny Amaral

Sent: Monday, December 26, 2016 9:32 AM

To: Ryan A. 'Smith; Denny Rehberg; Dennis Cardoza; David Bernhardt; Catherine Karen

Subject: Reminder

No call today

Best,

Johnny Amaral

Deputy General Manager - External Affairs

Westlands Water District

From: Denny Rehberg
Sent: Monday, December 26, 2016 10:16 AM
To: Johnny Amaral
CC: Ryan A. 'Smith; Dennis Cardoza; David Bernhardt; Catherine Karen
Subject: Re: Reminder

Hope you all had a Merry Christmas!

Denny

.....
Mercury.

Denny Rehberg

Co-Chairman

(US Congressman 2001-2013) 300 Tingey Street SE | Suite 202

Washington, DC | 20003

202.261.4000 office | [REDACTED] mobile

www.mercuryllc.com

> On Dec 26, 2016, at 9:32 AM, Johnny Amaral <jamaral@westlandswater.org> wrote:

>

>

> No call today

>

> Best,

>

> Johnny Amaral

> Deputy General Manager - External Affairs

> Westlands Water District

>

>

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From: Tom Birmingham
Sent: Tuesday, December 27, 2016 12:32 PM
To: 'zzNunes, Devin'; 'Ratekin, Anthony'
CC: 'Johnny Amaral'; 'Bernhardt, David L.'
Subject: Disaster Declaration
Attachments: Disaster Declaration.docx

Devin and Anthony,

Attached is the document you requested I draft. I suggest we have a telephone conference to discuss this document at your earliest convenience.

Tom

I have determined that the damage in certain areas of the State of California resulting from drought during the period of October 1, 2012 through the present, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq. Therefore, I declare that such a major disaster exists in the following counties of the State of California: Alameda County; San Joaquin County; Stanislaus County; Merced County; San Benito County; Madera County; Fresno County; Kings County; Tulare County; and Kern County.

In accordance with Section 7(p) of the Endangered Species Act, 15 U.S.C. 1531 et seq. (the "Endangered Species Act), I hereby find that operations of the Central Valley Project and the California State Water Project shall be exempt from the provisions of the Endangered Species Act. I also find that: (1) the United States Bureau of Reclamation has complied in good faith with its consultation obligations under Section 7 of the Endangered Species Act, but that there is no reasonable and prudent alternative that will enable Reclamation to operate the Central Valley Project and the State of California to operate the State Water Project to meet their purpose of supplying water for consumptive uses; (2) the benefits of operating the Central Valley Project and the State Water Project to supply water for consumptive uses outweigh the benefits of alternative courses of action consistent with conserving listed species or their critical habitat; (3) operations of the Central Valley Project and the State Water Project to supply water for consumptive uses is in the public interest; (4) operations of the Central Valley Project and the State Water Project to supply water for consumptive uses is of national significance; (5) and neither Reclamation nor the State of California made any irreversible or irretrievable commitment of resources as prohibited by subsection 7(d) of the Endangered Species Act.

I find that this exemption from the Endangered Species Act is necessary to prevent the recurrence of such a natural disaster and to reduce the potential harm to the populations of these counties, including the loss of human life, and involves an emergency situation which does not allow the ordinary procedures of this Section 7 of the Endangered Species Act to be followed.

This declaration of major disaster and the exemption for operations of the Central Valley Project and the State Water Project from application of the Endangered Species Act shall remain in effect until Reclamation has for two consecutive years made available to all south-of-Delta Central Valley Project agricultural water service contractors at least seventy-five percent of their respective contract quantities.